81-333

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No. 81-

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION,

Petitioner,

— *v.* —

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can an employer be found liable under 42 U.S.C. § 1981, absent a finding that such employer acted with an intent to discriminate?

2. Does an employer violate 42 U.S.C. § 1981 by the mere acceptance of workers from a discriminatorily-operated union hiring hall without regard to whether the employer knew, or should have known, of the union's discrimination and without regard to whether such union discrimination, in fact, had an adverse impact on the composition of that employer's workforce?

3. Can a class of 1,400 individual employers be held vicariously liable under 42 U.S.C. § 1981 solely by reason of a union's intentional discrimination in the operation of its hiring hall, where the district court found that (1) the employers were required to use the hiring hall by the terms of their collective bargaining agreements, (2) the hiring hall provisions set forth in the agreements were nondiscriminatory on their face, (3) there was no evidence that the employers knew, or should have known, of the discrimination being practiced by the union, and (4) the hiring hall was operated under the exclusive control of the union?

4. Did the court below properly enter a broad mandatory injunction, including mandatory quotas, against each of 1,400 employers without affording them an opportunity to present their individual defenses or individual employment statistics?

5. Was a defendant subclass of 1,400 employers properly certified under subdivisions (a) and (b)(2) of Federal Rule of Civil Procedure 23?

6. Did the district court secure *in personam* jurisdiction over 1,400 unnamed members of a defendant class through the device of a defendant class action?

PARTIES IN THE COURT OF APPEALS

This case was one of five appeals arising out of a single district court action. The appeals were consolidated below by the Court of Appeals. The parties to the consolidated proceedings in the court of appeals were:

Plaintiff-Appellees

(a) the Commonwealth of Pennsylvania, and

(b) twelve individuals, on their own behalf and as representatives of a class of similarly situated individuals.

Named Defendant-Appellants

(a) Local 542, International Union of Operating Engineers, AFL-CIO;

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware;

(c) four contractor associations: Contractors Association of Eastern Pennsylvania, General Building Contractors Association, Inc., United Contractors Association, and Pennsylvania Excavating Contractors Association, on behalf of themselves and as representatives of a defendant class of employer associations, (all but the the last named association are separate petitioners before this Court);

(d) Glasgow, Inc., on behalf of itself and as representative of a defendant class of employers; (a separate petitioner to this Court).

Nonparty-Appellants

Two unnamed members of the defendant employer class also filed timely appeals:

(a) Bechtel Power Corporation, petitioner here; [1] and

(b) United Engineers & Constructors Inc. (a separate petitioner to this Court).

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1 Pursuant to Supreme Court Rule 28.1, Bechtel Power Corporation states that it is a wholly-owned subsidiary of Bechtel Group, Inc., a privately-held corporation. Bechtel Power Corporation has no subsidiaries that are not wholly-owned. Affiliates of Bechtel Power Corporation are Bechtel Petroleum, Inc. (which has several wholly-owned subsidiaries); Bechtel Civil & Minerals, Inc. (which has several wholly-owned subsidiaries); Bechtel Investments, Inc.; and the following independent affiliates of Bechtel Group, Inc.: Becon Construction Company, Inc., and its subsidiary E & F Construction Specialists, Inc.; Dual Drilling Company; Bechtel International Corporation; Bechtel Eastern Limited; Bechtel International Constructors, Inc,; Bechtel & Associates; Bechtel Associates Professional Corporation; Bechtel Associates Professional Corporation, (D.C.); Bechtel Associates Professional Corporation, (Ohio); Bechtel Associates Professional Corporation, (Virginia); Bechtel Equipment; BICA, S.A.deC.V.; Saudi Arabian Bechtel Equipment Co., and Sequoia Ventures, Inc., and its wholly-owned subsidiaries.

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OCTOBER TERM, 1981

BECHTEL POWER CORPORATION,

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COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bechtel Power Corporation petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered on May 19, 1981.

OPINONS BELOW

District Court

The opinion of the District Court for the Eastern District of Pennsylvania, setting forth findings of fact and conclusions of

law on issues of liability (A 9),[2] is officially reported at 469 F. Supp. 329. The district court also entered a separate Judgment and Decree, accompanied by a Supplemental Opinion. The Judgment and Decree (A 228) is not officially reported; the Supplemental Opinion (A 213) is officially reported at 488 F. Supp. 988.

Court of Appeals

Consolidated appeals were initially heard by a panel of the Third Circuit Court of Appeals. Before a decision was issued, however, the court ordered reargument en banc. The judgment of the district court, to the extent challenged by Bechtel Power Corporation, was thereafter affirmed by an equally divided court. The opinion of the court (A 4) is officially reported at 648 F.2d 923.

JURISDICTION

The judgment of the court of appeals was entered May 19, 1981 (A 1), following reargument. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Civil Rights Act of 1866, as codified at 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as

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2 A joint appendix has been separately printed and submitted in support of this petition and the related petitions of United Engineers & Constructors Inc., Glasgow, Inc., Contractors Association of Eastern Pennsylvania, United Contractors Association, and General Building Contractors Association. Reference to the joint appendix will be made as "A". followed by the appropriate page number.

is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Subdivisions (a) and (b) of Federal Rule of Civil Procedure 23 provide:

> (a) Prerequisites to a Class Action.
> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable.
> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT OF THE CASE

An evenly divided court of appeals, sitting en banc,[3] affirmed a district court decision which (1) held some 1400 individual members of a defendant-employer class vicariously liable under 42 U.S.C. §1981 for a union's acts of intentional discrimination, and (2) subjected the employers to an extensive mandatory injunctive decree. Bechtel Power Corporation ("Bechtel"), the Petitioner and an unnamed member of the defendant-employer class, seeks review of the court's decision.

General Background

The action was filed in the district court in 1971, the principal allegation being that Local 542 of the International Union of Operating Engineers ("Local 542" or "the Union") had operated its hiring hall in a racially discriminatory manner. Plaintiffs were the Commonwealth of Pennsylvania, in its capacity as *parens patriae*, and twelve individual black operating engineers, who subsequently were certified as representatives of a class of over one thousand minority persons residing within Local 542's jurisdiction.

Named defendants were Local 542 and the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware ("JATC"). Also named as defendants were four employer associations ("the associations") and a single contractor, Glasgow, Inc. ("Glasgow"). The associations were certified by the district court as representatives of a defendant subclass of all

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3 Chief Judge Seitz and Judges Aldisert, Gibbons, Hunter, Weis, and Garth sitting; Judges Rosenn, Adams, Sloviter, and Higginbotham did not participate.

employer associations which had been parties to a collective bargaining agreement with Local 542 during the appropriate limitations period.

Glasgow was certified as the representative of all employer parties to collective bargaining agreements with Local 542 who had hired at least one operating engineer affiliated with the local during the relevant limitations period. The court estimated there were approximately 1400 members of this defendant-employer subclass[4] (A 14).

Bechtel is one of the unnamed members of the defendant-employer class. It was never served with process nor did it participate in the district court proceedings below.

Plaintiffs' Allegations As to Liability

In the complaint, the Union and JATC were alleged to have violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and 42 U.S.C. § 1981 ("§ 1981"). Because Title VII's administrative prerequisites had not been met as to the employer class (no charges were filed against the employers with EEOC, nor did they participate in the required conciliation procedure), the liability of the employer class could only be grounded in an alleged violation of § 1981.

Finally, plaintiffs alleged a conspiracy among the 1400 contractors and the Union, in violation of 42 U.S.C. §1985 (3).

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4 Issues concerning the subclass of employer associations are not discussed in this petition. References hereafter to the "defendant class" or "employer class" refer to the employer subclass and not the association subclass.

The Decision of the District Court

Prior to trial, the district court directed that the action be conducted in two stages: Stage I to consider liability and Stage II, damages. At the conclusion of Stage I, the court found that Local 542 and JATC had violated both Title VII and § 1981 by intentionally discriminating on the basis of race in both membership as well as referrals for work from the hiring hall. These findings were affirmed by the court of appeals, and Bechtel does not challenge them here.

The district court's opinion on the liability issue is lengthy, and the findings of fact regarding the Union, JATC, and the associations extensive. Findings related to the employers - and, therefore, to the issues Bechtel raises here - are few. They include findings that:

> (1) the hiring hall agreement to which the employers agreed is facially neutral and nondiscriminatory (A 30);
>
> (2) the Union's discriminatory referrals were in derogation of, rather than pursuant to, the hiring hall agreement (A 120, A 186);
>
> (3) the employers did not know, and had no reason to know, of the Union's discriminatory acts (A168, A 195, A 198); and,
>
> (4) plaintiffs failed to prove that the defendant-employer class acted at any time with discriminatory intent (A 195).

Equally significant are the findings that do not appear in the decision below. For example, there is no finding that any individual unnamed contractor, much less the class of 1400 contractors, engaged in any act of discrimination. Nor is there any finding concerning the extent of minority representation in the individual workforce of any unnamed employer class member.

Despite the foregoing, the court held that each member of the employer class was vicariously liable for the Union's acts of intentional discrimination - without any finding of intent or knowledge on the part of the employer class or its individual

members (A 168). In fact, the court expressly rejected the notion that discriminatory intent was a necessary element of a cause of action under § 1981 (A 167).

Finally, the court held that plaintiffs had failed to prove their §1985 (3) conspiracy claim (A 196 – A 198).

The Stage I Decree

In its Stage I judgment and decree ("the decree") (A 228), based upon its findings regarding the available minority workforce, the district court established membership quotas for Local 542 and JATC (A 236, A 244), and directed the Union to meet minority quotas in its work referrals to employers (A 236). The court went on to impose minority employment quotas upon the employers as well – totally without regard to the availability of minorities through the hiring hall (A 241 – A 244). Each contractor was required to periodically prepare and file special reports (A 248) listing employment data by individual minority and for its total workforce. Special minority training programs were also required of the employer class, although no findings were made that the employers had previously provided training to non-minorities (A 247 – A 248).

The Decision of the Court of Appeals

Following final amendment of the decree, several parties, including Bechtel, filed timely appeals in the Court of Appeals for the Third Circuit. The appeals were consolidated, and argument was ultimately heard, en banc. The court issued two judgments on May 19, 1981. As to the liability of the Union and JATC, it unanimously affirmed the judgment of the district court. As to the liability of the employer class, the court divided evenly, thereby affirming the district court (A 1, A 8). It is to review this latter judgment that Bechtel now seeks certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT WHICH NOW EXISTS AS TO WHETHER DISCRIMINATORY INTENT IS A NECESSARY ELEMENT OF A VIOLATION OF THE CIVIL RIGHTS ACT OF 1866.

By affirming the decision below, the court of appeals adopted the view that "a §1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including proof of disparate impact alone" (see A 167).

While this Court has clearly established that a Title VII violation may be established by proof of either intentional discrimination or disparate impact, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), it has not yet decided the equally important and equally fundamental issue of whether proof of intentional discrimination is required to establish a violation of the Civil Rights Act of 1866 (now codified in 42 U.S.C. § 1981 and § 1982). Twice before, this Court has granted certiorari and heard argument on this question, *Davis* v. *County of Los Angeles*, 440 U.S. 625 (1979), and *City of Memphis* v. *Greene*, ____ U.S. ____, 49 U.S.L.W. 4389 (April 20, 1981); however, the Court disposed of both cases without squarely deciding the question. Once again, the issue is presented to the Court, and because conflict exists in the lower court decisions, Bechtel urges that its petition be granted.

A divergence of opinion on this issue exists among the circuit courts of appeals. Several, following this Court's opinion in *Washington* v. *Davis*, 426 U.S. 229 (1976), have held that proof of discriminatory intent is necessary to establish a violation of §1981. *Guardians Association* v. *Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980); *Mescall* v. *Burrus*, 603 F.2d 1266 (7th Cir. 1979); *Williams* v. *DeKalb County*, 582 F.2d 2 (5th Cir. 1978); *Chicano Police Officers Ass'n* v. *Stover*, 552 F.2d 918 (10th Cir. 1977). The Court of Appeals for the District of Columbia Circuit has expressed a contrary view. *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977). The Ninth Circuit Court of Appeals also reached a contrary conclusion in *Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); but, since the vacating of *Davis*, a second panel of the court adopted the intent standard, *Craig* v. *County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1364 (1981). By its decision below, the Court of Appeals for the Third Circuit has expressed sufficient differences with its judicial counterparts to warrant this Court to again address this fundamental and recurring question.[5]

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5 Similar disagreement is evident among the district courts. Many have required proof of discriminatory intent to establish a claim under §1981. *Johnson* v. *Olin Corp.*, 484 F. Supp. 577 (S.D.Tex. 1980); *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, 488 F. Supp. 723 (D.N.J. 1980); *Williams* v. *City and County of San Francisco*, Nos. C-78-1312-SW and C-78-0171-SW (N.D.Cal. Sept. 26, 1979); *Louisville Black Police Officer's Organizations, Inc.* v. *City of Louisville*, 20 F.E.P. Cases 1195 (W.D.Ky. 1979); *Ball* v. *Ridgeway Enterprises, Inc.*, 478 F. Supp. 456, 461 (S.D. Tex. 1979); *Harris* v. *White*, 479 F. Supp. 996, 1002 (D. Mass. 1979); *Drayton* v. *City of St. Petersburg*, 477 F. Supp. 846, 855 (M.D. Fla. 1979); *Stewart* v. *Hannon*, 469 F. Supp. 1142 (N.D. Ill. 1979); *Rich* v. *Martin Marietta Corp.*

It is unnecessary for the Court to break new ground to resolve this narrow issue. All that is required is an explicit decision concerning what has been implicit in the Court's prior determinations. The Court has already traced the legislative lineage of § 1981 to the equal protection principles of the Fourteenth Amendment, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), and has decreed that the Fourteenth Amendment is violated only by acts of intentional discrimination, *Washington* v. *Davis*, 426 U.S. 229 (1976).

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5 (Footnote cont'd.):

467 F. Supp. 587, 617 (D. Colo. 1979); *Walker* v. *Robbins Hose Co. No. 1, Inc.*, 465 F. Supp. 1023, 1044 (D. Del. 1979) (dictum); *Flora* v. *Moore*, 461 F. Supp. 1104, 1116 (N.D. Miss. 1978); *Stewart* v. *City of Pontotoc, Mississippi*, 461 F. Supp. 767, 777 (N.D. Miss. 1978); *National Organization for Women* v. *Waterfront Commission of New York*, 460 F. Supp. 84, 87 (S.D. N.Y. 1978); *United States* v. *City of Buffalo*, 457 F. Supp. 612, 618 (W.D.N.Y. 1978) (dictum); *Queen* v. *Dresser Industries, Inc.*, 456 F. Supp. 257, 261 n.8 (D. Md. 1978) (dictum); *Arnold* v. *Ballard*, 448 F. Supp. 1025, 1027-28 (N.D. Ohio 1978); *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 964-966 (D. Md. 1977); *Ortiz* v. *Bach*, 14 F.E.P. Cases 1019, 1020 (D. Colo. 1977); *Johnson* v. *Hoffman*, 424 F. Supp. 490, 494 (E.D. Mo. 1977), *aff'd sub nom.*, *Johnson* v. *Alexander*, 572 F.2d 1223 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

However, several other district courts have adopted the view that liability can be imposed under §1981 without proof of discriminatory intent. *Guteirrez* v. *Aero Mayflower Transit Co.*, 22 F.E.P. Cases 447 (N.D. Cal. 1979); *Movement for Opportunity* v. *Detroit Diesel*, 18 F.E.P. Cases 557 (S.D. Ind. 1978); *Randolph* v. *U.S. Elevator Corp.*, 452 F. Supp. 1120, 1124 (S.D. Fla. 1978); *Dawson* v. *Pastrick*, 441 F. Supp. 133 (N.D. Ind. 1977), *rev'd in part on other grounds*, 600 F.2d 70 (7th Cir. 1979) (no discussion of *Washington* v. *Davis*). *See also Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1264 (D. Conn. 1979); *Winston* v. *Smithsonian Science Information Exchange Inc.*, 437 F. Supp. 456 (D.D.C. 1977) (dictum).

Moreover, in confirming that the proscriptions of the 1866 Act extend to private, as well as state action, this Court has characterized the private action so proscribed as that which is motivated by discriminatory intent. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (§ 1982); *Runyon* v. *McCrary*, 427 U.S. 160, 170-171 (1976) (§ 1981). Finally, and significant in view of the district court's identical treatment of Title VII and § 1981, this Court has established that § 1981 is "separate, distinct, and independent" from Title VII. *Johnson* v. *Railway Express Agency, Inc., supra*, at 461.

The decision below is in conflict with these prior Supreme Court decisions. It presents an opportunity to establish the evidentiary standard for measuring claims of discrimination brought under the 1866 Act and to resolve, once and for all, the conflict which now exists among the lower courts.

II. THE COURTS BELOW ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN DETERMING THAT THE DEFENDANT-EMPLOYER CLASS COULD BE FOUND VICARIOUSLY LIABLE UNDER §1981.

The error in the district court's vicarious liability finding is evident when tested by the proper touchstone of a valid claim under §1981, namely, the discriminatory intent of the party held liable. Intent, being a state of mind, is necessarily personal. Thus, to impute intent to one individual from the acts of another defies logic as well as established legal concepts.

Aside from its inconsistency with the concept of intent, the court's reasoning is not supported by the authorities upon which it relied. Those authorities fall into three categories: employment descrimination cases, decisions under the National Labor Relations Act ("NLRA"), and the common law doctrine of *respondeat superior*.

A. Imposition of Vicarious Liability Is in Conflict with Prior Employment Discrimination Cases.

Few employment discrimination cases have addressed the issue of an employer's liability for racial discrimination in the hiring hall context. But where the issue has been confronted, the courts have uniformly determined that employers or their associations are not liable for a union's independent acts of discrimination in a hiring hall operation. *Vogler* v. *McCarty, Inc.*, 294 F. Supp. 368, 374-75 (E.D. La. 1968), *aff'd sub nom. Heat & Frost Insulators and Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Allen* v. *Pipefitters Local Union No. 208*, 58 F.R.D. 473 (D. Colo. 1972); *McFadden* v. *Baltimore Steamship Trade Association*, 8 F.E.P. Cases 391 (D. Md. 1972).

The district court found these cases "unpersuasive" (A 174). Instead, it relied upon a group of decisions wherein a single employer and a union had negotiated a collective bargaining agreement with facially neutral seniority provisions which, when applied as written by the parties, had a disproportionately adverse impact on minorities (A 182).[6] In these cases, the courts generally found that the seniority provisions in the parties' agreements contravened Title VII, and both the union and the employer were held liable. On this point, the cited cases are now of doubtful authority, following this Court's delineation of *bona fide* seniority systems in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). The district court nevertheless considered these earlier cases sound support for the two principles which ultimately formed the basis of its theory of class-wide vicarious liability.

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6 *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson* v. *Lorillard*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

First, the court read these employment discrimination cases as establishing the principle that employers have an " 'affirmative duty' to prevent discrimination" (A 186). This holding is contrary to this Court's pronouncement in *Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978) that an employer's duty is merely to refrain from engaging in discrimination. Thus, the district court's holding is in conflict with this prior holding of the Court.

The district court also considered these employment discrimination cases as authority for the principle that an employer can be held liable solely because a collective bargaining agreement which it negotiates has a discriminatory impact on the employer's workforce (A 183). In applying this principle, the court erred twice. First, it failed to distinguish between a labor agreement which may be unlawful because it necessarily has adverse impact when applied as written by the parties, and a labor agreement which is neutral when applied as written by the parties and has an adverse impact only when misapplied by one party without the knowledge of the other. To hold both parties liable in the latter situation ignores the requirement that proof of discriminatory intent is a prerequisite to liability under §1981.

The court's second error was expanding the principle of the prior cases to find not one, but 1400, individual employers liable on the basis of literally hundreds of bargaining relationships and labor contracts, without regard to whether these agreements actually had an adverse impact on each employer's workforce. This theory of absolute vicarious liability cannot be reconciled with this Court's holding in *International Brotherhood of Teamsters, supra*, at 336, that a plaintiff in an employment discrimination class action must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure." It is also contrary to the principles enunciated in *Furnco, supra*.

B. The NLRA Cases Are in Conflict with and Do Not Support the Decisions Below.

The district court also relied upon three circuit court decisions wherein orders of the National Labor Relations Board were enforced. *NLRB* v. *H. K. Ferguson Co.*, 337 F.2d 205 (5th Cir. 1964), *cert. denied*, 380 U.S. 912 (1965); *Morrison-Knudsen Co., Inc.* v. *NLRB*, 275 F.2d 914 (2d Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); *NLRB* v. *United States Steel Corp.*, 278 F.2d 896 (3d Cir. 1960) (*en banc*), *cert. denied*, 366 U.S. 908 (1961) (A 169). In each case, the union had discriminated in work referrals on the basis of union membership. In each, the employer whose workforce was affected by the union's action was held liable for a violation of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). The district court concluded from these decisions that under the NLRA, employers are liable for a union's acts of discrimination regardless of whether the employer knew or should have known of such discrimination, and further concluded that the same rule should govern an employer's liability under § 1981.

Bechtel submits that the court erred in its interpretation of these NLRA cases. In *Morrison-Knudsen*, the court of appeals stated that the employer clearly had some knowledge of the union's discriminatory acts, 275 F.2d at 917; in *H. K. Ferguson*, the employer's unlawful activity was the "condoning or acquiescing in [the union's conduct]", 337 F.2d at 208; and in *United States Steel*, one of the employer's supervisory employees was instrumental in the unlawful activity, 278 F. 2d at 898. Thus, in no case was liability imposed on an employer who had no knowledge, direct or imputed, of the union's actions. Furthermore, at least two courts of appeals have expressly rejected the vicarious liability theory in the NLRA context. *NLRB* v. *Master Stevedores Association of Texas*, 418 F. 2d 140 (5th Cir. 1969); *Lummus Co.* v. *NLRB*, 339 F.2d 728 (D.C. Cir. 1964). The decisions below are clearly in conflict with these latter two decisions, and, when the findings in the record are examined, are actually in conflict with the three cases expressly relied upon.

C. The Common Law Doctrine of *Respondeat Superior* Should Not Be Applied in the Circumstances of this Case.

The district court's application of the doctrine of *respondeat superior* is also in error. Plainly, the court failed to recognize the legal and *de facto* relationships between employers and unions when it declared the Union to be the agent, indeed the servant, of the defendant-employer class. In common law, of course, the *sine qua non* of such a relationship is the existence of a right of control by the master (employers) over the acts of the servant (union). Understandably, there is no recitation in the decisions below of any basis for finding a right of control. The contention that a union is the servant of the employer with which it negotiates runs counter to the entire thrust of the NLRA, the purpose of which is to insure the right of employees to form labor organizations independent of employer influence, much less control. Plainly, the court's reliance upon *respondeat superior* ignores the legal and economic balance of power created by Congress in the NLRA and the total independence of organized labor from management domination.

Perhaps recognizing this, the district court endeavored to by-pass the "control" requirement with its conclusion that the employers had some affirmative nondelegable duty under §1981. Again, this reasoning is in conflict with this Court's holding in *Furnco, supra.*

III. THE COURTS BELOW ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW BY CREATING A NOVEL AND EXTRAORDINARY STANDARD OF LIABILITY UNDER § 1981 WHEREBY AN EMPLOYER MAY BE HELD LIABLE WITHOUT EVIDENCE OF EITHER DISCRIMINATORY INTENT OR DISCRIMINATORY IMPACT ON ITS WORKFORCE.

Under the case law prevailing prior to the decision below, it was uniformly recognized that § 1981 required a standard of proof either greater than, or equivalent to, that required under Title VII. Thus, as described earlier herein, the prevailing view was that § 1981 required a showing of purposeful discrimination, whereas Title VII afforded protection to discriminatees on a disparate impact theory, even in the absence of intent. The contrary view was that a violation of § 1981, like Title VII, required at least a showing of disparate impact, but no more. Yet, in the present case, Bechtel has been found guilty of a violation of § 1981 and subjected to a comprehensive mandatory injunction without any finding that it either purposefully discriminated or that its use of Local 542's hiring hall, in fact, caused any disparate impact on its own workforce.

We urge the Court to reflect upon the magnitude of the quantum leap taken in the decisions below. Under the classwide vicarious liability theory applied by the district court, a violation of § 1981 occurs even where:

> (1) an individual contractor does not know, and could not have known, of the discriminatory operation of a union hiring hall, use of which is required by a facially neutral provision of a labor contract; and
>
> (2) the discriminatory hiring hall does not, in fact, result in racial imbalance of that employer's own work force.

An employer who hired but a single operating engineer through the Local 542 hiring hall during the period from 1965 to 1978 thereby became a member of the defendant-employer class. Under the decision of the district court, such an employer is personally liable under § 1981 for compliance with the broad restraints of the injunction, even if the single employee hired was a black.[7]

Thus, the decisions below expand § 1981 to the point where proof of *neither* intent *nor* disparate impact is required. Bechtel was found liable under § 1981 not because it engaged in purposeful discrimination, nor because its workforce was shown to be adversely affected, but simply because Bechtel used a hiring hall which adversely affected a universe comprised of 1,399 other companies considered as an aggregate.

This is far beyond where any court as ventured in its interpretation of § 1981. In fact, it is far beyond where any court has ventured in its interpretation of Title VII. This Court's decisions in *Teamsters, supra*, and *Furnco, supra*, make it clear that an employer is only liable under Title VII if a plaintiff can demonstrate that discrimination has occurred in some fashion in that employer's workforce. The decisions below dispense with this requirement. In so doing, they redefine § 1981 as a statute imposing not a higher standard of proof than that required by Title VII, or even an equivalent standard, but one that imposes a lesser standard of proof than that required by Title VII.

No other circuit court has reached such a conclusion.

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7 This hypothetical is very nearly matched by reality. One employer, Barger, Inc., was denied summary judgment and subjected to the Decree despite uncontradicted evidence that minorities constituted at least 50% of its workforce at all relevant times.

IV. THE DECISIONS OF THE COURTS BELOW JEOPARDIZE THE STABILITY OF COLLECTIVE BARGAINING THROUGHOUT THE CONSTRUCTION INDUSTRY AND THEREFORE MERIT REVIEW BY THIS COURT.

The result of the district court's holding is that a contractor who utilizes a union hiring hall violates § 1981 if that union intentionally discriminates in its referrals, without regard to whether the contractor knew, or should have known, of the discrimination being practiced by the union, and without regard to whether the contractor's own workforce is adversely affected by the discrimination. Simply put, the contractor by merely using the hiring hall, becomes its guarantor and is *per se* liable for discriminatory union referrals from the hiring hall.

Bechtel is a national contractor employing thousands of union craftsmen at various projects throughout the United States. As such, it has national collective bargaining agreements with the International Unions of virtually all of the building trades. These contracts are negotiated at the International level and typically require that Bechtel use, sight unseen, the hiring hall of the International's affiliated local union having jurisdiction over the site of each Bechtel construction project throughout the country.

Under prevailing legal principles, if Bechtel were shown to have agreed to use a hiring hall operated by a local union which Bechtel knew to be discriminatory, imposition of liability under § 1981 would be foreseeable. If it were shown that Bechtel's workforce at a particular jobsite displayed a significant underutilization of minorities, Bechtel might appropriately be charged with notice of discrimination by the local union, likewise justifying the imposition of liability under § 1981. But it is neither just nor reasonable to hold Bechtel liable because

a union discriminates and thereby adversely affects the workforce of another employer, or of the universe of several hundred employers which operate in the vicinity of each Bechtel jobsite. Yet, this is the result of the decisions below.

If the lower court decisions represent the law of the land, the only way for Bechtel to protect itself from liability for countless unknown union violations of § 1981 is to attempt to negotiate the deletion of hiring hall provisions from its national agreements and to resist such provisions in each locality where it is engaged. Bechtel's situation is not unique. Indeed, every contractor, large or small, that has an exclusive hiring hall clause in its labor agreement faces the same dilemma.[8]

Employers must now reassess their collective bargaining agreements in view of the incalculable potential liability those agreements represent under the rule of law created by the courts below.[9] Yet, it can safely be predicted that any effort by employers to negotiate the deletion of hiring hall provisions from collective bargaining agreements will be steadfastly resisted by the construction trade unions. The risk of widespread disruption of labor relations in the construction industry, at odds with our national labor policy of promoting peaceful collective bargaining, is sufficient reason for this Court to carefully scrutinize the decisions below.

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8 Some 40 national agreements and 6,000 local agreements currently are in effect in the construction industry. U.S. Department of Labor, "Annual Construction Industry Report, April 1981", p. 12.

9 A second bilateral class action lawsuit is now pending in the Eastern District of Pennsylvania. That action, filed on behalf of a separate plaintiff class by the attorneys for plaintiffs in this action, alleges discrimination in the operation of the hiring hall of another construction trade union, the Ironworkers.

V. THE DECISIONS BELOW RAISE SERIOUS QUESTIONS CONCERNING THE USE OF DEFENDANT CLASS ACTIONS WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

A. Certification of the Defendant Class Was Contrary to Principles Established in Prior Decisions of this Court, and in Conflict with Another Circuit Court.

Before class certification is justified, a proposed class action must satisfy all four requirements of Rule 23(a), and one of the three alternative requirements of Rule 23(b). *Wetzel* v. *Liberty Mutual Insurance Company*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Here, the court erred in concluding that the requirements of Rule 23(a) were met, and further erred in certifying the class pursuant to subdivision (2) of Rule 23(b).

If evidence of discriminatory intent is necessary to establish a violation of § 1981, then, without question, certification of the defendant class was erroneous. Intent is an inherently subjective, and therefore individual, matter. The court below recognized this in dismissing plaintiff's conspiracy claim under § 1985(3) (A 197). Whether employer "A" had the requisite discriminatory intent is not a question in "common" with whether employer "B" had the same requisite intent. See *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Thus, the requirement of subdivision (a)(2) of Rule 23 that there be questions of law or fact common to the class was not satisfied in this case.

It is also apparent from the diverse structure of the construction industry, particularly the multiplicity of collective

bargaining relationships, that the claims and defenses of 1400 contractors will be neither "common" nor "typical." Individual questions of fact abound. Two questions of fact obviously not "common" to each member of the defendant class are (1) whether an individual employer's hiring practice were discriminatory, and (2) what impact these practices had on that employer's individual workforce. As stated above, imposition of liability without consideration of such evidence is contrary to the principles expressed in *Teamsters, supra,* and *Furnco, supra.* The need to consider such individualized information renders erroneous as a matter of law the certification of a defendant class under the circumstances of this case.

The court's certification of the defendant class under subdivision (b) (2) of Rule 23 was also improper. While it appears that certification of a *plaintiff* class under subdivision (b) (2) is appropriate in discrimination suits, few courts have carefully addressed whether (b) (2) certification is appropriate for a *defendant* class. It is evident from a plain reading of subdivision (b) (2) that it was not intended to govern defendant class actions; and for this reason, the Fourth Circuit Court of Appeals recently concluded that certification of a defendant class under subdivision (b) (2) is *not* appropriate, *Paxman* v. *Campbell,* 612 F.2d 848 (4th Cir. 1980) (en banc); *see also Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126, 140, n.28 (7th Cir. 1974); 7A Wright & Miller, *Federal Practice & Procedure,* 1775, at 21-22; 3B J. Moore, *Federal Practice,* 23.40[b], at 23-310. One reason for preferring such a result is illustrated by this case. Whereas the discretionary notice permitted under subdivision (b) (2) proved insufficient in this case to alert all class members to the pending adjudication of their rights, the mandatory notice and opt-out procedures of subdivision (b) (3) would more adequately protect the important due process interests of the absent class members.

B. The Exercise of Personal Jurisdiction over Defendant Class Members Is a Denial of Due Process of Law.

No unnamed member of the defendant employer class was served with a summons or complaint. Employers who first used the Local 542 hiring hall after 1973 did not receive notice of the lawsuit, although, because of this use, they became defendant class members and were subsequently held liable. At the close of trial, each member of the defendant employer class was required to comply with the terms of a mandatory injunctive decree, to be in effect until August 31, 1985. Each employer class member, of course, is subject to personal liability for failure to comply with its terms.

This imposition of personal liability upon absent class members violates the fundamental principle of Anglo-American jurisprudence that a court can not adjudicate a personal obligation unless the person to be held liable is served with process and brought before the court as a party. *See Zenith Corporation* v. *Hazeltine*, 395 U.S. 100 (1969). The procedural device of a class action does not expand the jurisdiction of the federal courts, nor can it override the constitutional due process considerations which underlie this principle. *Christopher* v. *Brusselback*, 302 U.S. 500 (1938).

To support its imposition of mandatory injunctive obligations on absent class members, the court relied upon *Hansberry* v. *Lee*, 311 U.S. 32 (1940). In our view, *Hansberry* supports Bechtel's position. There, the Court held that while absent defendants might be "bound" in the sense of *"res judicata"* by a judgment rendered in their absence, the petitioners before it were not so bound because the prior proceedings failed to satisfy the requirements of due process. The Court's reference to the *res judicata* effect of the prior determination defines the limits of a defendant class action. Here, for example, individual class members might be bound by the district court's finding that the Union engaged in intentional discrimination, and, if upheld, its conclusion of law concerning vicarious

liability; these could not be relitigated by defendant class members. However, an individual class member may not be subjected to a sweeping and onerous mandatory injunction until the court acquires personal jurisdiction over it and it is afforded a hearing on such matters as its membership in the class and any unique personal defenses that it may have, such as a racially balanced workforce.

Defendant class actions are no longer a rarity. The misuse of the procedural class action device as a sweeping remedial shortcut, without regard for due process protections, should not be fostered. The Court should accept this opportunity to speak directly on the appropriate scope of defendant class actions, and the protections to which defendant class members are entitled.

CONCLUSION

For the reasons set forth above, we respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Dated: August 11, 1981

Respectfully submitted,

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No. 81-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION, *Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA AND RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, AND FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL CONSTRUCTORS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

This brief is submitted by the National Constructors Association as an amicus curiae pursuant to Rule 36 of this Court.

The National Constructors Association (herein NCA) is a non-profit, voluntary association composed of fifty-five of the Nation's largest, unionized construction contractors.[1] NCA member companies design and construct industrial facilities throughout the United States and abroad. These facilities include nuclear and fossil fuel electric power plants, oil refineries, pipelines, chemical and petrochemical plants, mining and metallurgical facilities, paper mills, and many other industrial processing facilities.

NCA member companies perform their construction projects using union represented labor. Typically, NCA member companies do not retain a permanent workforce of construction employees. Rather, for each project they hire and employ skilled building trades workers in the area of the project under the terms of national collective bargaining agreements with international unions in the building trades. Since the construction of a large industrial facility may require the employment of ten or more crafts, an NCA member may have collective bargaining relationships with all or many of the building trades' international unions.

The collective bargaining agreements signed by NCA members take diverse forms.[2] However, they possess

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[1] Petitioner Bechtel Power Corporation is a member of the National Constructors Association.

[2] Some are multi-craft, regional agreements, such as the National Industrial Construction Agreement, which is between the NCA, on behalf of its member companies, and nine international unions. This agreement covers NCA member companies' construction projects within a 14-state area in the South and Southwest. NCA member companies also frequently sign multi-craft "project" agreements with international unions and their subordinate local unions, covering construction of a single large project. While these

one common attribute: each obligates the contractor to hire craft employees for its projects through the hiring halls maintained by the international unions' local union affiliates with jurisdiction at the project site.

Under this system of doing business, it is not uncommon for a national contractor to use local hiring halls of several craft unions on each of its construction projects. Accordingly, the district court's decision in this case, that liability for a discriminatorily operated hiring hall may be imposed on any employer using the hiring hall, is of vital interest and utmost concern to the NCA and its member companies.

REASONS FOR GRANTING THE WRIT

Under the district court's holding, any contractor receiving a referral through a discriminatorily operated hiring hall is held strictly accountable for acts of racial discrimination practiced solely by the union operator of the hiring hall. The district court's opinion not only signals a fundamental departure from previously accepted legal principles developed under 42 U.S.C. § 1981, but it ignores and conflicts with established collective bargaining practices in the construction industry which have received Congressional scrutiny and approval. In so doing, the district court's

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contracts are binding on the locals, the locals may or may not be signatories. Most NCA members also are signatory to "National" agreements with one or more international unions. These agreements govern the employment of a specialized construction craft on the company's projects throughout the United States. See generally *The Bargaining Structure in Construction: Problems and Prospects*, U.S. Department of Labor-Management Services Administration, 1980, pp. 4-5.

opinion undermines important federal objectives and endangers these historic, and Congressionally sanctioned, collective bargaining practices.

Moreover, the decision places an inequitable burden on contractors who have no control over the operations of these hiring halls, have no choice regarding their use, and, in many circumstances, particularly where national agreements are involved, no practical way to ascertain each local's referral practices. Federal law has sanctioned the establishment of the hiring hall system in construction and has brought about monopoly control over the unionized labor pool. Federal law also sanctions the employers' use of these institutions through collectively bargained agreements entered into as a result of actual or threatened strikes, picketing or the withholding of labor. The decision below ignores such realities and treats construction union hiring halls as if they were just another group of employment agencies.

1. If the district court's opinion is permitted to stand, national contractors will be placed in an extremely serious and grave dilemma. Because national contractors normally obtain referrals from several different hiring halls on each of their several projects, the district court's opinion exposes them to strict liability for the operations of each of these hiring halls. The sole avenue available to contractors to avoid this immense liability is the restructuring or abandonment of the hiring hall system since, as described *infra*, pp. 9-12, federal labor law policies and industry practices preclude the attainment of effective safeguards against union hiring hall discrimination through negotiations. However, measures as draconian as the abandonment or restructuring of the hiring hall system in

themselves will needlessly encourage labor strife and undermine the recognized benefits from the hiring hall system.

To begin with, it is impractical for contractors in the construction industry to abandon the hiring hall system. Union operated hiring halls provide a ready pool of skilled labor in the geographic area where the construction work is to be performed. Construction companies, by contacting the hiring halls, can determine the availability and cost of labor before estimating and bidding projects. The hiring hall thus serves a crucial function that permits the bidding and construction of large, and frequently geographically remote, projects. Indeed, this Court and Congress both have commented favorably on the essential role fulfilled by hiring halls in the construction industry:

> The [National Labor Relations] Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." The hiring halls at times have been a useful adjunct to the closed shop. But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter, the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment". (Footnotes omitted.)

Local 357, *International Bro. of Team., etc.* v. *N.L.R.B.*, 365 U.S. 667, 675-676 (1961). And, as this

Court also observed, Congress made clear the view that hiring halls are useful:

> In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall. . .

S. Rep. No. 1827, 81st Cong. 2d Sess. pp. 13, 14.

By the same token, contractor efforts at restructuring the hiring hall system to install employer control against union racial discrimination would subject contractors to strikes and coercive actions by the affected unions, thereby destabilizing the collective bargaining structure in the construction industry. Hiring halls are embedded in the fabric of construction union operations. They have long provided an invaluable tool for unions to service their membership and attract new members. Indeed, NCA and its members are unaware of any major construction craft union that does not, through its affiliated local unions, operate a hiring hall system.

It is, therefore, obvious that any contractor initiated changes in the hiring hall system would be resisted, undoubtedly to the point of a strike, by the construction unions. The sheer size and economic magnitude of the industrial projects constructed by NCA members greatly magnifies the coercive power inherent in the strike weapon.[3] The potential losses attributable

[3] In 1980, NCA member companies performed domestic construction projects with an aggregate value of over 26 billion dollars.

to a strike on such a project make it indefensible to require a contractor to risk strikes in an effort to halt the union's self-generated discrimination.

The forecast of a strike over hiring hall operations is not a chimera. The district court found that Defendant Operating Engineers Local 542 conducted strikes of several weeks' duration to compel employer acceptance of its hiring hall. Local 542's insistence on, and strike over, a hiring hall has many parallels among other craft unions. Given this resort to economic warfare to achieve the hiring hall, it is improbable that unions would relinquish any portion of their total control over the hiring hall absent a strike.

Nor does an NCA member contractor have alternatives to the unions and their hiring halls. Since each craft union has a monopoly over the workers in its particular trade, a contractor performing unionized construction must develop a collective bargaining relationship and use the hiring hall to obtain workers in that trade. A contractor cannot, for example, obtain skilled pipefitters from the Ironworkers Union. Moreover, in many instances the unions, through their hiring halls, are the sole source of the large numbers of skilled tradesmen required to perform the construction of large industrial facilities. Additionally, some clients of NCA members require that their projects be built entirely with union labor thereby obligating the contractor to use the craft unions and their hiring halls.

Finally, even if a contractor could bypass a union that practiced discrimination in its hiring hall and obtain referrals from another source, the contractor would be unable to construct the project as a union

constructor because the other unionized trades would undoubtedly refuse to work alongside such employees.[4]

In short, the district court's opinion confronts contractors with a Hobson's choice: either incur liability for the unions' discriminatory conduct in operating the hiring halls used by the contractor or risk coercive union action and/or termination of the hiring hall system by efforts to curb the unions' discrimination. The Amicus submits that no statutory nor policy objective justifies such a result.

2. The district court's application of agency principles to hold the contractor liable for the acts of the union hiring hall is clearly erroneous because it ignores the unions' coercive action that compels contractors to accept the hiring hall. To be valid, an agency relationship must be consensual. See Restatement (Second) of Agency § 15 (1957). Accordingly, where, as here, unions may, and do, lawfully use coercion or threats of coercion through strike activity to obtain employer agreement to hiring halls, the application of agency principles to assess liability against the employer is improper because the use of the hiring hall is not voluntary. The hiring hall structure in the construction industry therefore contrasts sharply with employment agencies in other industries where the employer voluntarily selects the agency. The district court's failure to consider and apply these differences fatally flaws its decision.

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[4] The refusal of union workers on construction sites to work with non-union brethren is a well-documented fact that, to a certain degree, has been accommodated by Congress and recognized by this Court. See *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

3. Under the district court's decision, national contractors, such as NCA members, are liable for a union's discriminatory operation of a hiring hall notwithstanding that the contractor is powerless to prevent the union's unlawful discrimination and frequently has had no contact with the union regarding the hiring hall. As noted, national contractors enter national collective bagaining agreements with one or many building trades international unions. These agreements provide that the national contractor will adopt on its projects many terms of the labor contracts negotiated by the international union's affiliated local union in the area. The adopted conditions universally include the obligation to use the local union's hiring hall.

As a general rule, the local unions neither negotiate nor sign National Agreements. Instead, the national contractor merely notifies the local union that the project will be performed under the terms of the National Agreement and requests employee referrals from the hiring hall. National contractors, thus, do not negotiate with the local unions concerning the establishment or operation of hiring halls or any other term or condition of employment. Hence, they are unable to negotiate antidiscrimination safeguards into the hiring hall operation.

Much more significant, however, is the fact that the contractor is legally powerless to negotiate antidiscrimination safeguards even if it has the opportunity to bargain with the local unions about hiring hall operations. The contractor's collective bargaining agreements, in many instances, are prehire agreements since they necessarily antedate the start of construction and the hiring of employee complements. The National Labor Relations Board, with this Court's ap-

proval, holds that there is no statutory bargaining duty concerning prehire agreements in the construction industry. *R. J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), enf. denied *sub. nom. Engineers Local 150* v. *N.L.R.B.*, 480 F.2d 1186 (D.C. Cir. 1973); *N.L.R.B.* v. *Local U. No. 103, Intern. Ass'n., etc.*, 434 U.S. 335 (1978).

The absence of a statutory bargaining duty means that the unions have no obligation to negotiate with a contractor about prehire agreements. This encompasses the right to refuse to participate in negotiations regarding the elimination or prohibition of discrimination in the operation of the unions' hiring halls. Indeed, it is the experience of NCA members that building trades unions frequently offer contractors national labor contracts only on a "take it or leave it" basis. The proferred agreements universally include obligations to accept the local union hiring hall "as is" and the "take it or leave it" basis effectively precludes any contractor efforts to prevent or deal with discriminatory practices. The district court completely disregarded these factors and its decision imposing liability on national contractors because of the union's discrimination in such circumstances is manifestly unjust.

Apart from these obstacles to a contractor's ability to ensure against union discrimination in the operation of the hiring halls, the very nature of construction operations makes it virtually impossible for a national contractor to learn of the discriminatory operation of a union hiring hall. Construction projects typically are of relatively short duration. A contractor's utilization of a particular craft and hiring hall may be limited to only a portion of the project. During this brief time

span, the national contractor lacks any means of determining if discrimination infects the hiring hall apparatus. For example, a contractor could not evaluate whether a hiring hall was being operated in a discriminatory manner based on the number of minority referrals that it received. For, notwithstanding a discriminatorily operated hiring hall, a contractor could be referred an inordinate number of minorities and conversely, a non-discriminatory hiring hall could refer a totally white complement to any particular employer.[5]

Nor can national contractors learn of hiring hall discriminatory practices in any other manner. National contractors are frequently strangers to the geographic areas of their projects. Their presence in the locale is transitory and terminates when the project is completed. They rarely are members of the local employer association that negotiates the local collective bargaining agreements including the hiring hall provisions. These contractors, therefore, have neither the opportunity to discuss the operation of the hiring hall during negotiations nor the time to learn of its operations through work experience in the locale. Rather, they are obligated to accept the hiring hall as they find it if they are to perform unionized construction in the area.

The district court's failure to consider this fundamental collective bargaining structure and its decision to impose liability on national contractors in disregard of the constraints placed on them by federal law and

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[5] This apparently occurred in this case since 50% of the referrals from Local 542's hiring hall to one contractor were minorities. See Bechtel Power Corporation Petition for a Writ of Certiorari, p. 17, n. 7.

industry practice requires this Court's review and correction.

4. The district court's decision imposing the injunction and racial quotas on non-party contractors represents a divergence from established legal theories and raises serious questions of due process. These issues need be addressed by this Court. Not the least of these concerns, from the Amicus' perspective, is that the district court's decision, if it becomes the accepted law, raises serious questions regarding the contractors' ability to comply with court-ordered remedial relief.

The members of NCA perform construction work in diverse areas of the United States by utilizing the hiring halls of many different local unions in the various trades. Under the district court's decision, a national contractor, who was party to a collective bargaining agreement with Local 542 and received one referral from that union's hiring hall, is subject to the court's injunctive order and thereby obligated to hire and employ a certain quota of minorities. That same national contractor typically will be performing construction projects in other areas and employing operating engineers from different hiring halls on those projects. If any of those hiring halls have been operated in a discriminatory manner, the contractor could, as a class defendant, be subjected to lawsuits and injunctive decrees issued by the courts in those areas which directly conflict with the relief granted by the district court in this case.

For example, a national contractor subject to injunctive requirements for hiring minorities in this case, could become subject to decrees in other cases regarding the hiring of percentages of females and

whites simply because the contractors used other hiring halls where the unions were found to have engaged in sex or reverse discrimination. It would be difficult, if not impossible, in such circumstances to comply with the courts' orders. The risk that contractors could be subjected to conflicting adjudications is a telling commentary on the impermissible scope of the district court's findings and furnishes a further reason why the Court should review and reverse the erroneous underlying decision.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 81-333

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE PETITIONER BECHTEL POWER CORPORATION

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QUESTIONS PRESENTED

1. Can an employer be held liable for employment discrimination under 42 U.S.C. § 1981 absent a finding that the employer acted with an intent to discriminate?

2. Does an employer violate 42 U.S.C. § 1981 by the mere acceptance of workers from a discriminatorily-operated union hiring hall without regard to whether the employer knew, or should have known, of the union's discrimination and without regard to whether such union discrimination, in fact, had an adverse impact on the composition of that employer's work-force?

3. Can a class of 1,400 individual employers be held vicariously liable under 42 U.S.C. § 1981 solely by reason of a union's intentional discrimination in the operation of its hiring hall, where the district court found that: (1) the employers were required to use the hiring hall by the terms of their collective bargaining agreements, (2) the hiring hall provisions set forth in the agreements were nondiscriminatory on their face, (3) there was no evidence that the employers knew, or should have known, of the discrimination being practiced by the union, and (4) the hiring hall was operated under the exclusive control of the union?

4. Did the court below properly enter a broad mandatory injunction, including minority employment quotas, against each of 1,400 employers without affording them an opportunity to present their individual defenses or individual employment statistics?

5. Was a defendant class of 1400 employers properly certified under subdivisions (a) and (b)(2) of Federal Rule of Civil Procedure 23?

6. Did the district court secure *in personam* jurisdiction over 1,400 unnamed members of a defendant class through the device of a defendant class action?

THE PARTIES

The findings and conclusions of the district court spawned several appeals, which were consolidated before the court of appeals. The two judgments of the court of appeals, in turn, resulted in five petitions for certiorari, which this Court has granted and consolidated. The parties, and their status in the proceedings, are:

Plaintiff-Appellees Below

(a) the Commonwealth of Pennsylvania, and

(b) twelve black operating engineers, as individuals and class representatives of approximately 1,000 black operating engineers.

These parties are respondents before this Court.

Named Defendant-Appellants Below

(a) Local 542, International Union of Operating Engineers, AFL-CIO (not a petitioner to this Court);

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware (not a petitioner to this Court);

(c) the Contractors Association of Eastern Pennsylvania and United Contractors Association (petitioners in 81-331), the General Building Contractors Association (petitioner in 81-280), and the Pennsylvania Excavating Contractors Association (now defunct), individually and as class representatives;

(d) Glasgow, Inc. (petitioner in 81-332), individually and as class representative of approximately 1,400 employer-contractors.

Nonparty-Appellants Below

Two unnamed members of the defendant-employer class:

(a) United Engineers & Contructors Inc. (petitioner in 81-330); and

(b) Bechtel Power Corporation (petitioner here in 81-333).*

*No changes have occurred in Bechtel Power Corporation's corporate affiliations, set forth at p. iii of its Petition for Writ of Certioriari.

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In The

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OCTOBER TERM, 1981

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BECHTEL POWER CORPORATION,

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On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE PETITIONER BECHTEL POWER CORPORATION

OPINIONS BELOW

District Court

The opinion of the District Court for the Eastern District of Pennsylvania, which includes findings of fact and conclusions of law on issues of liability, is reported at 469 F.Supp. 329 (PA 9).[1] The district court entered a separate Judgment and Decree, which is not reported (PA 228); the Supplemental Opinion filed with the decree, however, is reported at 488 F.Supp. 988 (PA 213).

[1]Material printed in the appendix filed with Bechtel Power Corporation's Petition shall be referred to as "PA" followed by the page number. Material printed in the joint appendix filed with this Brief in accordance with Rule 30 shall be referred to as "JA" followed by the page number.

Court of Appeals

A panel of the Third Circuit Court of Appeals heard argument in the consolidated appeals; but, before the panel issued its decision, the court ordered reargument *en banc*. Following the reargument, an evenly divided court of appeals affirmed the judgment of the district court in an opinion reported at 648 F.2d 923, which is the subject of this petition. The court also affirmed the judgment of the district court with respect to the liability of Local 542, International Union of Operating Engineers, and the Local 542 Joint Apprenticeship and Training Committee, in an opinion reported at 648 F.2d 922.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Third Circuit Court of Appeals (PA 1) was entered May 19, 1981. Bechtel's petition for a writ of certiorari was filed on August 17, 1981, within ninety days of the entry of judgment by the court of appeals, and was granted by this Court on October 19, 1981.

STATUTORY PROVISIONS INVOLVED

The issues raised by this petition involve interpretation and application of the following statutes and rules:

42 U.S.C. §1981

Federal Rules of Civil Procedure 23(a) and 23(b)

The text of each is set forth in the Addendum which appears at the end of this brief. The Addendum also sets forth the language of:

Civil Rights Act of 1866, §1

Fourteenth Amendment, §1

Enforcement Act of 1870, §16 and §18

42 U.S.C. §1982

STATEMENT OF THE CASE

Pursuant to a writ of certiorari granted by this Court, Bechtel Power Corporation ("Bechtel") in this case (No. 81-333, consolidated with Nos. 81-280, 81-330, 81-331 and 81-332) seeks review of a *per curiam* decision of the Third Circuit Court of Appeals affirming, by an evenly divided court,[2] a judgment and decree entered by the District Court for the Eastern District of Pennsylvania (Circuit Judge Higginbotham, sitting by designation) which:

(1) certified a defendant class of over 1400 employers,

(2) held the members of the defendant class vicariously liable under 42 U.S.C. §1981 for a labor union's intentional acts of race discrimination, and

(3) subjected the 1400 individual employers to an extensive mandatory injunction, including minority employment "goals".

Although this litigation has stretched over some 10 years and has generated a voluminous record, the facts essential to this appeal are few, straightforward, and largely uncontroverted.

The Hiring Hall Requirement

Local 542 of the International Union of Operating Engineers ("Local 542" or "the Union") has a geographical jurisdiction which includes the eastern half of Pennsylvania and the State of Delaware (PA 28). Local contractors working in that area on a union basis generally enter into collective bargaining agreements directly with Local 542. Some local contractors (perhaps 20% of the defendant-employer class) have formed local contractor associations which negotiate with Local 542 on behalf of their members (PA 29). National contractors, such as Bechtel, generally negotiate national labor agreements with the

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[2]Chief Judge Seitz and Judges Aldisert, Gibbons, Hunter, Weis, and Garth sitting; Judges Rosenn, Adams, Sloviter, and Higginbotham did not participate.

international construction trades unions. These national agreements typically incorporate local labor standards (including hiring halls, where they exist), but the national contractor may never negotiate directly with the local union or, indeed, even be signatory to a contract with the local union.[3]

During 1961 labor contract negotiations, Local 542 conducted a ten week strike to force the local contractor associations to agree to an exclusive hiring hall provision in their area collective bargaining agreement (PA 23). A second strike occurred in 1963 when the contractor associations unsuccessfully sought to remove the hiring hall requirement from the area labor contract (JA 310). Since that time, all contractors who perform work on a union basis within the expansive jurisdiction of Local 542 have been contractually required to utilize Local 542's hiring hall when employing operating engineers.

The particular hiring hall requirement negotiated by Local 542, and binding on all contractors performing work on a union basis within Local 542's jurisdiction, was specifically found by the district court to be lawful and nondiscriminatory on its face (PA 30), and was administered solely by Local 542. A system of referral lists was created, and an employer bound by the hiring hall agreement is required to select its operating engineers from among those referred by the Local 542 hiring hall (PA 24-26). The employer retains control over terminations, and has a limited right to recall an employee laid off within 90 days (PA 26).

The Local 542 hiring hall, use of which was required by contract, is the focal point of the present litigation.

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[3]The district court opinion did not discuss the manner in which national contractors operate. It found "no distinction between national and local contractors" (PA 202).

The Lawsuit

This action was filed in the district court in 1971; the principal allegation being that Local 542 had operated its hiring hall in a racially discriminatory manner. Plaintiffs were the Commonwealth of Pennsylvania, as *parens patriae,* and twelve individual black operating engineers, thereafter certified as representatives of a class of over one thousand minority persons residing within Local 542's jurisdiction (PA 17, 144-145).

The named defendants were (1) Local 542, (2) the Operating Engineers Joint Apprenticeship and Training Committee ("JATC"), (3) four employer associations ("the associations"),[4] and (4) a single contractor, Glasgow, Inc. ("Glasgow"). Glasgow was certified as the representative of "all employers who have been parties to a collective bargaining agreement with Local 542 and who hired at least one operating engineer affiliated with Local 542" during the relevant limitations period (PA 200). The district court estimated that there were approximately 1400 members of this defendant-employer subclass (PA 14). Certification of this class was based, in part, on the district court's conclusion that it was not necessary, under 42 U.S.C. §1981, to inquire into either the intent or the workforce statistics of the individual employers. (PA 201-202, 212). Bechtel is one of the unnamed members of the defendant-employer class, and was never served with process nor did it participate in the district court trial.

In the complaint, Local 542 and JATC were alleged to have violated both Title VII of the Civil Rights Act of 1964, 42

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[4]The associations were certified as representatives of a defendant subclass of all employer associations which had been parties to a collective bargaining agreement with Local 542 during the appropriate limitations period. This brief is not directed to issues concerning the subclass of employer associations. References herein to the "defendant class" or "defendant-employer class" refer to the employer subclass and not the association subclass.

U.S.C. §2000e *et seq.* ("Title VII"), and 42 U.S.C. §1981 ("§1981"). The complaint did not allege a Title VII cause of action against the defendant-employer class, presumably because Title VII's administrative prerequisites had not been met as to the class. In dealing with the potential liability of the defendant-employer class, the district court considered only the alleged §1981 violation, and an alleged conspiracy among the 1400 contractors and Local 542, in claimed violation of 42 U.S.C. §1985(3).

The District Court's Decision on Liability

The district court divided the trial into two stages. Stage I, now complete, addressed issues of liability. Stage II, yet to commence, will resolve issues of damages. At the conclusion of Stage I, the court found that Local 542 and JATC had violated both Title VII and §1981 by intentionally discriminating on the basis of race, both in granting membership within the Union and in making hiring hall referrals to employers. In particular, it found that Local 542 engaged in a series of individual departures from the "out-of-work" lists for the purpose of providing nonminority members with work referrals to which minority members were entitled. These findings were affirmed by the court of appeals, and Bechtel does not challenge them here.

The district court's liability opinion is lengthy, and its findings of fact regarding Local 542, JATC, and the association extensive. Findings related to the employers — and, therefore, to the issues Bechtel raises here — are few. They include findings that:

(1) the hiring hall agreement to which the employers agreed is facially neutral and nondiscriminatory (PA 30);

(2) Local 542's discrimininatory referrals were in derogation of, rather than pursuant to, the hiring hall agreement (PA 120, 186);

(3) the employers did not know, and had no reason to know, of Local 542's discriminatory acts (PA 168, 195, 198); and,

(4) plaintiffs failed to prove that the defendant-employer class acted at any time with discriminatory intent (PA 195).

Significantly, there is no finding that any individual unnamed contractor, much less the class of 1400, engaged in any act of discrimination in selecting employees from referrals, in terminating employees, or in exercising recalls. Nor is there any finding concerning the extent of minority representation in the individual workforce of any unnamed defendant-employer class member.[5]

Despite the foregoing, the district court held that each member of the defendant-employer class was vicariously liable under §1981 for the intentional discrimination of Local 542. The district court expressly held that discriminatory intent was not a necessary element of a cause of action under §1981 (PA 167), although the failure of the plaintiffs to establish such intent was considered fatal to their §1985(3) conspiracy claim (PA 197, 198).

The Stage I Decree

In its Stage I Judgment and Decree ("the decree"), the district court established membership quotas for Local 542 and JATC (PA 236, 244), and required the Union to meet minority quotas in its work referrals to employers (PA 236). The court went on to impose minority employment quotas upon the 1400

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[5]The extensive statistical evidence presented by the plaintiffs related primarily to employment of operating engineers either throughout Local 542's jurisdiction or within District 1 of its jurisdiction. Statistical evidence was also presented with respect to the employment of minorities by the designated class representative, Glasgow. No statistical evidence regarding Bechtel's workforce appears in the record.

employers as well — without regard to the availability of minorities through the hiring hall (PA 241-244, PA 308-314). In addition, each contractor was required to prepare and file monthly reports (PA 248, 314-315), listing employment data for individual minority employees and for its total workforce. Special minority training programs were also required of the employer class (PA 247-248), although no findings were made that the employers, as a class, had previously provided training to nonminorities.

The decree also provided that the costs of its implementation — sending notices, recordkeeping, special master fees — were to be paid by "the defendants" (PA 247, 251). At the time the appeals were filed below, those costs had reached $46,470 (PA 303, 306, 342).[6] The district court allocated these costs among the named defendants (PA 282-286). This order was the subject of an appeal by Glasgow, which argued that implementation costs should be imposed on all absent defendant class members. Bechtel, purportedly represented by Glasgow, was an appellee in that appeal.[7]

The Judgment of the Court of Appeals

Following final amendment of the decree, several parties, including Bechtel, filed timely appeals, which were consolidated. After argument before a panel, reargument *en banc* was ordered; subsequently, on May 19, 1981, the court of appeals issued two judgments. As to the liability of Local 542

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[6]Post Decree Orders 30, 34, and 40, entered subsequent to the commencement of the appeals below, have raised the total assessed costs to $161,882. The decree runs for four more years.

[7]There is still pending in the circuit court an appeal filed by Bechtel (No. 81-1514) which seeks review of a later district court ruling that Glasgow has a right of contribution from Bechtel and other class members with respect to the payment of implementation costs. Class representative Glasgow is an appellee in that appeal.

and JATC, it unanimously affirmed the opinion of the district court. This judgment is not before the Court for review. As to the liability of the defendant-employer class, the court divided evenly, thereby affirming the district court (PA 1, 8). Bechtel seeks reversal of this judgment.

SUMMARY OF ARGUMENT

It may be helpful to first state what issues are not before this Court. The district court made extensive findings as to the conduct of Local 542, and concluded that it engaged in intentional acts of racial discrimination in the administration and operation of its hiring hall; these findings are not challenged here. Nor is there any issue as to whether actions of the defendant-employers manifested a discriminatory intent; the district court specifically found that the employers did not act with discriminatory intent, and the respondents have never challenged that finding.

This petition focuses on narrow but important questions of law concerning the imposition of vicarious liability under §1981 on the 1400 members of the defendant-employer class, based solely on their use of the hiring hall as required by their labor contracts, without knowledge that Local 542 was operating the hiring hall in a discriminatory fashion.

In addition, this petition urges that the certification of the defendant-employer class was both improvidently granted and applied.

The District Court Erroneously Interpreted §1981.

The foundation of the district court's vicarious liability theory is its conclusion of law that a showing of discriminatory intent is not a prerequisite to liability under 42 U.S.C. §1981. This Court has not yet decided whether discriminatory intent is a necessary element of proof under §1981. It has announced, in

Washington v. Davis, 426 U.S. 229 (1976), that discriminatory intent is a necessary element of proof under the Fourteenth Amendment, from which §1981 descends. Since that decision, six circuit courts of appeals have held that discriminatory intent *is* a necessary element of proof under §1981 and no circuit court currently holds to the contrary.

This conclusion is supported by the legislative history of §1981. The language of that section appeared first in the Civil Rights Act of 1866, enacted pursuant to the Thirteenth Amendment, and was reenacted in the Enforcement Act of 1870, grounded on the Fourteenth Amendment. Congressional intent that this statutory provision conform to Fourteenth Amendment standards cannot fairly be ignored. Neither can the broad applicability given to §1981 by modern interpretation, or the substantial distinctions between §1981 and Title VII, under which the "disparate impact" theory of liability has evolved. Each of these considerations supports the conclusion that a showing of discriminatory intent is a prerequisite to the imposition of liability under §1981.

Since the district court found that there was no discriminatory intent on the part of the defendant-employers, it is clear that the court erred in imposing liability on the defendant-contractors.

The District Court Erred In Imposing Vicarious Liability.

Intent, of course, is subjective, and must be determined on an individual basis. If §1981 does, in fact, require a showing of discriminatory intent, the district court erred in holding that each of the defendant-employers was liable, not for *its* intent, but for the separate and independent intent of Local 542.

The district court acknowledged that there was no direct authority for its vicarious liability rationale. The authorities cited as analogous, when examined closely, do not support the

imposition of vicarious liability in this case. The employment discrimination cases upon which the court relied involve collective bargaining agreements which by their terms were discriminatory; here, there was no such finding. The court also relied upon circuit court cases decided under the National Labor Relations Act. In these, as well, no vicarious liability was imposed for union hiring hall discrimination without evidence of employer knowledge or participation; here, the district court found the employers neither knew nor should have known of Local 542's discrimination. Finally, the district court's reliance upon the common law doctrine of *respondeat superior* is misplaced. Plainly, that doctrine, with its key element of control by the "master" over the "servant", is singularly inapplicable to the labor-management relationship.

The District Court Improperly Utilized The Defendant Class Action Device.

Because the district court erred in framing the liability issues before it, it also erred in certifying the defendant-employer class. Intent, for example, is a peculiarly individual question. Business necessity, as a defense under any standard of liability, is an individual question. The degree of utilization of blacks will likewise vary from workforce to workforce. Even under the *respondeat superior* doctrine, the degree of control that an employer may have over the union hiring hall is an individual question. Thus, it is clear that this defendant class did not satisfy the "commonality" and "typicality" requirements of Rule 23(a)(2) and (3). Furthermore, inherent conflicts between the designated class representative and absent class members have resulted in inadequate representation of class interests, leaving Rule 23(a)(4) unsatisfied. Finally, the district court erred as a matter of law in certifying a defendant class under subdivision (b)(2) of Rule 23.

Even if the defendant-employer class was properly certified, however, the district court improperly utilized the defendant class device to impose on absent class members personal liability for compliance with the court's mandatory injunctive decree. This extension of the court's personal jurisdiction to parties not before it and never served with process is unwarranted, and contrary to traditional notions of due process.

For all these reasons, Bechtel respectfully submits that the judgment of the court of appeals should be reversed, and the district court decree vacated insofar as it purports to impose liability on non-party members of the defendant-employer class.[8]

[8]To minimize duplication, Bechtel incorporates by reference the discussion of the vicarious liability and class certification issues which appears in the brief filed by United Engineers & Constructors Inc., petitioner in No. 81-330.

ARGUMENT

POINT I

42 U.S.C. §1981 imposes liability only for acts of intentional discrimination, and the courts below erred in failing to apply this standard.

The district court expressly held that there had been no showing that Bechtel or other members of the defendant class either knew or should have known of the discrimination being practiced by Local 542. Accordingly, it irresistibly follows that neither Bechtel nor other members of the defendant class engaged in intentional or purposeful discrimination. Since the liability of the defendant-employer class is premised solely, and wholly, on a claimed violation of §1981, the core legal question thus presented by these consolidated petitions is whether 42 U.S.C. §1981 requires a plaintiff to prove discriminatory intent on the part of the defendant charged with its violation.

The district court concluded that intent was not required, holding:

> that a §1981 employment discrimination claim may be proven on roughly the same basis as a Title VII claim, including *proof of disparate impact alone.* (PA 167, emphasis added)

This conclusion of law was affirmed by an evenly divided court of appeals. Bechtel contends that it is erroneous. Purposeful discrimination — not mere statistical disparity — must be shown to establish liability under §1981. This conclusion is compelled by the unanimous position now taken by the circuit courts, the legislative history of §1981, the present-day scope of §1981, and the significant distinctions between §1981 and Title VII.

A. *Since This Court's Decision In Washington v. Davis, The Circuit Courts of Appeals Have Unanimously Adopted The View That §1981 Requires Proof of Discriminatory Intent.*

The discussion concerning the evidentiary standard to be applied under §1981 has evolved into a choice between an "intent" standard and an "impact" standard. This bipolar analysis is a product of this Court's decisions in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Washington v. Davis*, 426 U.S. 229 (1976). In *Griggs*, the Court held that a prima facie case under Title VII is established by showing that a facially neutral practice had a disparate impact on the employment of minorities in a particular workforce, without regard to whether discrimination was intended. Because §1981, like Title VII, proscribes private employment discrimination, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), many courts initially extended the Title VII "impact" test to claims brought under §1981.

However, in *Washington v. Davis, supra*, this Court held that proof of discriminatory intent was a necessary element of a cause of action brought under the equal protection clause of the Fourteenth Amendment. This Court and others have recognized the historical nexus between §1981 and the Fourteenth Amendment. See *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431, 439, n. 11 (1973); *Guardians Association v. Civil Service Commission*, 633 F.2d 232, 267 (2d Cir. 1980). Consequently, since the decision in *Washington v. Davis*, each circuit that has considered the issue has held that the constitutional standard of liability governs actions brought under §1981.

Specifically, the Courts of Appeals for the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have held that §1981 is violated only by actions taken with an intent to discriminate. *Croker v. Boeing Co.*, ____ F.2d ____, 26 F.E.P. Cases 1569

(3rd Cir. 1981);[9] *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1364 (1981); *Guardians Association v. Civil Service Commission*, 633 F.2d 232, 263-268 (2d Cir. 1980); *Mescall v. Burrus*, 603 F.2d 1266, 1271 (7th Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2, (5th Cir. 1978); *Chicano Police Officers Association v. Stover*, 552 F.2d 918 (10th Cir. 1977). Three other courts of appeals, not presented directly with the question, have expressed their concurrence with this view. *Detroit Police Officers Association v. Young*, 608 F.2d 671, 692 (6th Cir. 1979); *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 15-16 (1st Cir. 1979); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978). No circuit court now holds to the contrary.[10]

The district court's authority for adopting the Title VII standard of proof for §1981 actions was the decision in *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977). Subsequent to the district court's decision, *Davis* was vacated as moot by this Court, *Id.*, 440 U.S. 625 (1979), and thus deprived of any precedential value. The Ninth Circuit Court of Appeals thereafter held that the appropriate standard under §1981 was one of intentional discrimination. *Craig v. County of Los Angeles, supra; Golden v. Local 55, International Association of Firefighters*, 633 F.2d 817 (9th Cir. 1980).

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[9]It is ironic in the extreme that the decision in the present case no longer represents the views of even the Third Circuit which decided it. On May 12, 1981, the Third Circuit heard argument in both this case and *Croker, supra*. In this case, with six judges sitting, the court split evenly, affirming the district court's application of an "impact only" standard under § 1981. Thereafter, with nine judges sitting, the court held in *Croker* that §1981 does require proof of discriminatory intent.

[10]Early dicta of the Court of Appeals for the District of Columbia suggested a different view, *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977), but the court has not squarely decided the issue.

Thus, every circuit to have ruled on the issue agrees that purposeful discrimination is required to establish a violation of §1981.

B. ***The Constitutional Origin and Historical Context of §1981 Support the Conclusion That §1981 Proscribes Only Intentional Discrimination.***

Although the legislative history of §1981 has been explored in detail by courts and commentators[11], the judicial exegesis of §1981 has not always followed a straight path. Compare *Johnson v. Railway Express Agency, Inc., supra,* at 459-460, with *Runyon v. McCrary,* 427 U.S. 160, 168, n.8 (1976). However, with this Court's decision in *Runyon,* it is now accepted that §1981 has roots in both the Thirteenth and Fourteenth Amendments.

After ratification of the Thirteenth Amendment in 1865, the Thirty-Ninth Congress passed the Civil Rights Act of 1866.[12] Section 1 of that Act provided:

> . . . citizens, of every race and color, . . . shall have *the same right . . . to make and enforce contracts,* to sue, be parties, and give evidence . . . and to full and *equal benefit of all laws and proceedings* for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties,

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[11] See Heiser, *Intent v. Impact: The Standard of Proof Necessary To Establish A Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981,* 16 San Diego L. Rev. 207 (1979) (cited hereafter as Heiser, *Intent v. Impact*); Note, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870,* 1978 Brigham Young L. Rev. 1030 (cited hereafter as *Burden of Proof*); Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?,* 1977 Duke L.J. 1267 (cited hereafter as *Racially Disproportionate Impact*).

[12] Act of April 9, 1866, Ch. 31, 14 Stat. 27 (referred to hereafter as "the 1866 Act").

> and to none other, any law, statute, ordinance,, regulation, or custom, to the contrary notwithstanding. (Emphasis added).

The Fourteenth Amendment, with its guarantee of equal protection of the laws, was ratified in 1870; pursuant to §5 of the Amendment, the Forty-first Congress passed the Enforcement Act of 1870.[13] To quell contemporaneous doubts that the Thirteenth Amendment was sufficient basis for the 1866 Act, Congress explicitly reenacted the 1866 Act in §18 of the 1870 Act, pursuant to its enforcement power under the Fourteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). In addition, §16 of the 1870 Act consists of a virtually *verbatim* repetition of the "right to contract" language in the 1866 Act. Thus, the language now codified as §1981 derives from both the 1866 Act and the 1870 Act.[14]

It was the view of the district court that §1981 was enacted pursuant to the Thirteenth Amendment, and "simply reenacted" after adoption of the Fourteenth Amendment (PA 167). This "close connection to the thirteenth amendment" convinced the court that it would be inappropriate to apply to §1981 the Fourteenth Amendment standard of intentional discrimination. However, the statute's Thirteenth Amendment lineage is no bar to adoption of an intent standard. In *Griffin v. Breckinridge*, 403 U.S. 88 (1971) this Court held §1985(3) to be a valid enactment pursuant to the Thirteenth Amendment, and at the same time held that "invidiously discriminatory animus" was a necessary element of a cause of action under that statute.

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[13]Act of May 31, 1870, Ch. 114, 16 Stat 140 (referred to hereafter as "the 1870 Act").

[14]The Addendum attached to this brief sets forth the language of these enactments.

Moreover, as the district court itself noted, the motivation for incorporating the 1866 Act into the 1870 Act was to anchor those statutory provisions firmly to the Fourteenth Amendment in the face of existing doubt that the Thirteenth Amendment afforded sufficient constitutional foundation. See *Davis v. County of Los Angeles,* 566 F.2d 1334, 1349 (Wallace, J., dissenting). Thus, Congress in 1870 intended more than the "simple reenactment" of the 1866 Act; it intended that the 1866 Act be interpreted consistent with the length and breadth of the Fourteenth Amendment. Indeed, the Third Circuit Court of Appeals, itself, has observed that

> [t]he fourteenth amendment was intended to embody the principles of the 1866 act . . . Thus, interpretation of the fourteenth amendment might well shed some light on the meaning of the 1866 act.

Mahone v. Waddle, 564 F.2d 1018, 1029, n.21 (3rd Cir. 1977). We submit that this Court's conclusion in *Washington v. Davis, supra,* that the Fourteenth Amendment imposes liability only for intentional discrimination sheds definitive light on the question of the appropriate evidentiary standard under §1981.

This interpretation is also supported by reference to the evil which Congress sought to remedy in 1866. Blacks were no longer slaves, but their status as freedmen had been rendered largely illusory by the "Black Codes" adopted by the state legislatures of the reannexed Confederacy. The Black Codes varied somewhat from state to state, but consisted of a series of laws and ordinances designed to keep the freedmen "in their place". The Congressional purpose in adopting the 1866 Act was to render such enactments unlawful. Heiser, *Intent v. Impact,* at 237-239. Some of these statutes explicitly singled out black persons for disparate treatment, while a few could be described as facially neutral.[15] However, it was clear to

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[15]Restrictive, but facially neutral, vagrancy laws are the most commonly cited example.

Congress that all of the statutes, whether or not facially neutral, had been adopted with the intent to deprive freed blacks of equal rights. *Croker v. Boeing Co., supra;* see Heiser, *Intent v. Impact,* p. 238. The "intentional discrimination" standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), would permit, indeed require, a finding that the Black Codes were unlawful under the Fourteenth Amendment. Adherence to the same standard under §1981 does no violence to, and is consistent with, Congressional intent in enacting the 1866 Act.

The Court of Appeals for the Second Circuit recently examined the language and legislative origins of §1981 in *Guardians Association v. Civil Service Commission, supra,* and concluded:

> The legislative history of §1981 fails to convince us that the intent of the statute is more subtle than its language and structure would indicate . . . Objectively viewed, the language, structure and history of §1981 all point to the conclusion that the statute was simply intended to prohibit *purposeful racial discrimination* in a wide variety of circumstances, including but not limited to employment discrimination.

Id. at 701-703 (emphasis added).

C. *Section 1981 Is Separate, Distinct And Independent From Title VII And Title VII Standards Should Not Be Superimposed Onto Section 1981.*

It is obvious that §1981 is not simply a nineteenth century edition of Title VII. This Court has made it clear that

> the remedies available under Title VII and §1981, although related and although directed to most of the same ends, are separate, distinct, and independent . . . *Johnson v. Railway Express Agency, Inc.,* 421 U.S. at 461 (1975).

This alone would seem to refute the district court's conclusion that a §1981 claim "may be proven on roughly the same basis as a Title VII claim." Careful examination of the two statutes reinforces petitioner's position.

While §1981 and Title VII overlap, "[s]ection 1981 is not coextensive in its coverage with Title VII." *Johnson v. Railway Express Agency, Inc., supra.* There are important differences in the respective schema of Title VII and §1981:

Title VII focuses sharply on the single issue of employment discrimination.	§1981 sweeps broadly across the whole of contract law, and beyond, to encompass a wide range of civil rights.
Title VII is thorough, proscribes specific unlawful employment practices, and is augmented by a substantial body of regulations that give employers guidance in complying with the "disparate impact" formula, cf. 29 C.F.R. 1600 *et seq.*	§1981 is brief, general rather than specific, and is illuminated by no body of regulations.
Title VII creates a special administrative body and a formal administrative process for screening out frivolous or defective claims.	§1981 is administered only by the courts and is subject to no administrative procedures to screen out frivolous or defective claims.
Title VII imposes a uniform, and relatively short, statute of limitations.	§1981 is governed by limitations periods which differ from state to state and may be as much as six years.
Title VII remedies are limited to equitable, make-whole remedies, and recovery of back pay is generally limited to two years.	§1981 authorizes both legal and equitable remedies including compensatory and punitive damages not available under Title VII; and back pay is limited only by the applicable state statute of limitations.

Given these sharp differences between the two statutes, it is not only reasonable, but desirable, to erect a higher evidentiary threshold in §1981 actions. This is consistent with, indeed justifies, the more extensive remedies available under §1981. It will also serve the function of limiting the number of frivolous cases that reach court dockets, similar to the screening function played by Title VII's administrative procedures. *See, Davis v. County of Los Angeles,* 566 F.2d 1334, 1350 (9th Cir.) (Wallace, J. dissenting), *vacated as moot,* 440 U.S. 625 (1979).

The disparate impact concept sanctioned in *Griggs* is a sophisticated, second generation weapon for attacking discrimination. Indeed, the judicial imprimatur placed on the disparate impact theory in *Griggs* relied in large part on legislative history indicating that Congress in 1964 was clearly concerned about the potential disparate impact of otherwise facially neutral practices. *Griggs v. Duke Power Co.,* 401 U.S. 434-436. No such evidence appears in the legislative debates preceding the 1866 and 1870 Acts. *See, Racially Disproportionate Impact, supra* at 1279-1280; *Burden of Proof, supra,* at 1050-1053. To assume that this advanced concept was known or considered by nineteenth century legislators in enacting the 1866 and 1870 Acts would comport with neither a sense of history nor common sense.

Finally, it is clear that Congress did not intend to either contract or expand the rights and remedies afforded by §1981 when it enacted Title VII. *Johnson v. Railway Express Agency, Inc., supra.* In 1972, Congress specifically rejected an effort to preclude the application of §1981 to employment discrimination and to make Title VII the exclusive remedy in such cases. *Runyun v. McCrary,* 427 U.S. 160, 174 (1976). The record indicates that Congress intended to preserve the body of law which had developed under the Reconstruction Era statutes. *Burden of Proof, supra,* at 1048-1049. That body of law had almost exclusively applied a discriminatory intent standard. Brest, *The Supreme Court, 1975 Term — Forward: In*

Defense of the Antidiscrimination Principle, 90 Harvard Law Review 1, 27 (1976).

D. ***Present Day Interpretation Of §1981 and the Reconstruction Statutes Requires Adoption of An Intent Standard.***

It is the present-day interpretation of §1981 itself, rather than the present-day interpretation of Title VII, which must be considered. It is now settled that §1 of the 1866 Act is to be construed as governing private conduct. *Jones v. Alfred H. Mayer Co., supra* (§1982); *Johnson v. Railway Express Agency, supra* (§1981). Judicial decisions have extended its protective umbrella to cover a wide range of both private and state action.[16] In addition, §1981 governs the right to sue, to be a party to a legal proceeding, to give evidence, and to be subject to equal taxes, license provisions, and other exactions.

No basis is offered, nor does one appear, upon which an "impact only" standard might be applied to one or some of these rights and an "intent" standard to the others. *Guardians Association v. Civil Service Commission, supra,* at 266. In *Washington v. Davis, supra,* this Court observed that the application of the disparate impact standard to such a broad panoply of rights would

> raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more

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[16] *See, Hills v. Gautreaux,* 425 U.S. 284 (1976) (housing practices); *Cody v. Union Electric Co.,* 518 F.2d 978 (8th Cir. 1975) (utility security deposits); *Olzman v. Lake Hills Swim Club, Inc.,* 495 F.2d 1333 (2d Cir. 1974) (contract for admission to private recreation facility); *Jennings v. Patterson,* 488 F.2d 436 (5th Cir. 1974) (construction of road barricade); *United States v. Medical Society of South Carolina,* 28 F.Supp. 145 (D.S.C. 1969) (contract for medical care); *Ortego v. Merit Insurance Co.,* 433 F.Supp. 135 (N.D. Ill. 1977) (contract for insurance); *Grier v. Specialized Skills, Inc.,* 326 F.Supp. 856 (W.D.N.C. 1971) (contract for education).

> affluent white . . . extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

Washington v. Davis, supra, at 248.

The judicial expansion of §1981's scope and the evolution of the disparate impact theory have so far proceeded as two separate and distinct developments. As recognized by this Court in *Washington v. Davis,* the merger of these two trends would create a situation so volatile that its accomplishment by judicial fiat is inappropriate. As §1981 is accorded the broad scope appropriate to a statute vindicating constitutional rights, so it should be construed to measure conduct by the constitutional standard of purposeful discrimination.

This action arises from the private sector, but §1981, like the Fourteenth Amendment, extends to governmental action. Virtually any action which can be brought under the Fourteenth Amendment can also be brought under §1981. Consequently, one result of adopting an "impact only" standard for §1981 would be to effectively nullify this Court's holding in *Washington v. Davis,* because plaintiffs could "end run" the Fourteenth Amendment intent standard by pleading only §1981. *See, Guardians Association v. Civil Service Commission, supra,* at 268.

A number of §1981's companion statutes also derive from civil rights enactments of the Reconstruction Congress. It is appropriate therefore to consider the evidentiary standard which has been established for these statutes. For example, §1982 has precisely the same origins as §1981. This Court has not yet squarely faced the question of what evidentiary standard applies under §1982,[17] but has stated:

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[17] In *City of Memphis v. Greene,* ___ U.S. ___, 49 U.S.L.W. 3931 (April 20, 1981), *rehearing denied,* ___ U.S. ___, 49 U.S.L.W. 4389 (June 15, 1981), the question was presented, but the Court decided the case on other grounds. Justice White, concurring in the result, would have held that § 1982 is violated only by intentional discrimination.

> . . . the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case — that §1 was meant to prohibit all *racially motivated* deprivations of the rights enumerated in the statute . . . *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis added).

In later holding that §1981 reaches private action, the Court referred to its prior holding in *Jones* in these terms:

> Just as in *Jones* a Negro's §1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser *solely because he was a Negro,* so also a Negro's §1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, *solely because he is a Negro,* the same opportunity to enter into contracts as he extends to white offerees.

Runyon v. McCrary, 427 U.S. 160, 170-171 (1976) (footnote omitted; emphasis added). It is difficult to imagine language more indicative of an intent requirement than Justice Stewart's formula that the conduct be motivated solely by racial considerations.

The Court's analysis of another companion civil rights statute, §1985(3), is also applicable to §1981. In *Griffin v. Breckinridge,* 403 U.S. 88 (1971), the Court declared that the reach of §1985(3) extended to private conspiracies entered into with the purpose of depriving persons of the equal protection of the law. It had been argued that extension of §1985(3) to private action would render the statute an unconstitutional intrusion by Congress into areas reserved to local governments. However, the Court found that:

> [t]he constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motiva-

> tion stressed by the sponsors of the limiting amendment. 403 U.S. at 102.

The matters addressed by §1981 — contracts, juries, capacity to sue — are also matters long reserved to local law, and §1981 can no more be construed as a general federal tort law than can §1985(3). As in *Griffin*, the answer to this objection is the requirement of proof of intentional discrimination. So construed, §1981, §1982, §1985(3), and the Fourteenth Amendment — all adopted shortly after the Civil War — achieve the legal symmetry of all requiring intentional discrimination as an essential element of any violation.

POINT II

The courts below erroneously substituted a vicarious liability standard of proof for the proper standard of intentional discrimination.

The error in the district court's vicarious liability theory is evident when it is tested by the true touchstone of a §1981 claim, namely, the discriminatory intent of the party held liable. Intent, being a state of mind, is necessarily personal. Thus, to impute intent to one individual from the acts of another defies logic as well as established legal concepts. The law cannot at the same time hold that §1981 renders one liable only for intentional discrimination, and at the same time impose liability where there is no intent to discriminate.

This court has recently had occasion to take the next step beyond *Washington v. Davis* and to describe the level of motivation which satisfies the constitutional standard of discriminatory intent. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). The Court said:

> '[d]iscriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences. [citation omitted]. It implies that the decision

> maker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group [footnote omitted]. 442 U.S. at 274.

This language leaves no room for the position adopted below that the defendant-employers could be held liable under §1981 in the complete absence of any evidence that they "selected or reaffirmed" any course of action "because of" its adverse effect on minorities. Stated in a different way, Local 542 engaged in purposeful discrimination and therefore was properly found in violation of §1981. Bechtel and the other unnamed employers did not engage in purposeful discrimination and therefore could not be found to have violated §1981.

Aside from its inconsistency with the concept of intent, the district court's reasoning is not supported by the authorities upon which it relied. Those authorities fall into three categories: employment discrimination cases, decisions under the National Labor Relations Act ("NLRA"), and cases interpreting the common law doctrine of *respondeat superior*.

A. *Imposition Of Vicarious Liability Is Contrary To Prior Employment Discrimination Cases.*

Few employment discrimination cases have addressed the issue of an employer's liability for racial discrimination in the hiring hall context. But where the issue has been confronted, the courts have uniformly determined that employers or their associations are not liable for a union's independent acts of discrimination. *Vogler v. McCarty, Inc.*, 294 F.Supp. 368, 374-75 (E.D. La. 1968), *aff'd sub nom. Heat & Frost Insulators and Asbestos Workers v. Volger*, 407 F.2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F.R.D. 473 (D. Colo. 1972); *McFadden v. Baltimore Steamship Trade Association*, 8 F.E.P. Cases 391 (D. Md. 1972).

The district court found these cases "unpersuasive" (PA 174). Instead, it relied upon a line of circuit court

decisions,[18] each of which presented essentially the same factual situation: an employer and union negotiated a collective bargaining agreement with seniority provisions which were facially neutral, but which, when applied according to their terms, had a disproportionately adverse impact on minorities (PA 182). In each of these cases, the court found that the seniority provisions in the labor agreement violated Title VII because of their adverse impact on minorities, and held both the union and the employer liable. On this point, the cited cases are now of doubtful authority, following this Court's delineation of *bona fide* seniority systems in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). The district court nevertheless considered these cases support for the principle that "all parties to a collective bargaining agreement which by its terms has a discriminatory impact can bear civil rights responsibility." (PA 183).

The district court correctly summarized these authorities as involving "a collective bargaining agreement which *by its terms* has a discriminatory impact" (emphasis added). Here, however, the collective agreement "by its terms," i.e. if implemented by both parties as written, was *not* discriminatory. Disparate impact resulted not from application of the agreement as negotiated and written, but rather from the intentional departure from that agreement by Local 542. There is not the slightest suggestion in the record that the hiring hall agreement would have had a disparate impact if lawfully administered by Local 542. Accordingly, these cases relied upon by the district court are simply and clearly inapposite.

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[18] *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. dismissed,* 434 U.S. 801 (1977); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Robinson v. Lorillard,* 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

The court also read these "seniority provision" cases as establishing the principle that an employer has an " 'affirmative duty' to prevent discrimination" (PA 186). This principle is contrary to this Court's holding in *Furnco Construction Co. v. Waters,* 438 U.S. 567, 577 (1978), wherein it determined that an employer's duty is merely to refrain from engaging in discrimination; see also, Brief of United Engineers & Constructors Inc. Thus, even if the district court correctly stated the holdings of those cases, they have subsequently been overruled on this point by *Furnco, supra.*

B. *The Cases Arising Under The National Labor Relations Act Do Not Support the Imposition Of Vicarious Liability.*

The district court relied upon three circuit court decisions wherein orders of the National Labor Relations Board were enforced (PA 170).[19] In each case, the union had discriminated in work referrals on the basis of union membership (not race), in violation of the National Labor Relations Act ("NLRA"). In each, the employer whose workforce was affected was held liable for a violation of section 8(a)(3) of the NLRA, 29 U.S.C. §158(a)(3). Based on these decisions, the district court concluded that under the NLRA, employers are liable for a union's acts of discrimination regardless of whether the employer knew or should have known of such discrimination. It further concluded that the same rule should govern in a §1981 case.

We respectfully disagree with the court's interpretation of these decisions. In *Morrison-Knudsen,* the court of appeals stated that the employer clearly had some knowledge of the union's discriminatory acts, 275 F.2d at 917; in *H.K. Ferguson,*

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[19] *NLRB v. H.K. Ferguson Co.,* 337 F.2d 205 (5th Cir. 1964), *cert. denied,* 380 U.S. 912 (1965); *Morrison-Knudsen Co., Inc. v. NLRB,* 275 F.2d 914 (2d Cir. 1960), *cert. denied,* 366 U.S. 909 (1961); *NLRB v. United States Steel Corp.,* 278 F.2d 896 (3d Cir. 1960) *(en banc), cert. denied,* 366 U.S. 908 (1961).

the employer's unlawful activity was the "condoning or acquiescing in [the union's conduct]", 337 F.2d at 208; and in *United States Steel,* one of the employer's supervisory employees was instrumental in the union's unlawful activity, 278 F.2d at 898. In none of the cases was liability actually imposed upon an employer who had no knowledge of the union's actions. Further, at least two courts of appeals have expressly rejected the vicarious liability theory in the NLRA context. *NLRB v. Master Stevedores Association of Texas,* 418 F.2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB,* 339 F.2d 728 (D.C. Cir. 1964).

Most significantly, no NLRA case cited by the district court remotely supports the expansive legal theory adopted in this action. In each cited case an individual employer or association was held liable under the NLRA only after proof that an identified person was denied an employment opportunity with *that* employer or association *because* of the union's illegal refusal to refer *that* person to *that* employer or association. We are aware of no decision where the NLRB has determined that an employer violated the NLRA simply by using the services of a hiring hall which discriminated generally in the industry. Absent a showing that the union's discrimination affected, in fact, the work force composition of a particular employer, that employer would not have violated the NLRA.

C. *The Common Law Doctrine Of Respondeat Superior Does Not Apply To The Circumstances Of This Case.*

The third and final leg supporting the district court's vicarious liability stool is the common law doctrine of *respondeat superior.* In its application of this doctrine, the court characterized the relationship between the employers and Local 542 as that of "master" and "servant," or at least "principal" and "agent" (PA 186). In so doing, the court ignored not only federal labor law, but also the realities of labor relations.

The *sine qua non* of an agency relationship, of course, is a right of control by the master or principal over the acts of the servant or agent. Restatement (Second) of Agency §1. The district court found that the employers posessed this right of control because they had the right to enforce the terms of the collective bargaining agreement (PA 192). Plainly, this reasoning is erroneous. Such a rule would transmute every contractual relationship into an agency relationship, a result both undesirable and uncontemplated by the common law.[20]

A second objection is the court's characterization of the 1400 contractors as a single master of the "servant" union. The court refers to the "potential collective capacity" of the employers (PA 192), and the "collective delegation" of the employment process by the "mass of employers collectively" (PA 195). This is, quite simply, not the real world. The "class" of employers had no collective or unified existence, no legally cognizable "being", until its certification by the court. The existence of multiple employer associations certainly is no evidence that the mass of 1400 employers moved with a single will, for the district court found that "relatively few" of the employers even belonged to the associations (PA 29). When a local contractor association signed an agreement with Local 542, it bound only its members to the use of the hiring hall. When Bechtel agreed with the International Union of Operating Engineers to use local hiring halls where they existed, it bound only itself. There is simply no basis in the record for finding that the class of 1400 employers collectively delegated anything to anybody.

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[20]Nor does the district court explain why the employers should have taken steps to enforce the agreement when the court also found that they neither knew nor should have known that it was being violated. Indeed, the ultimate irony is that following the district court's decision the local contractors *did* obtain an arbitration ruling that they were no longer contractually bound to the discriminatory hiring hall, and the district court vacated that award and ordered the contractors to continue exclusive use of the Local 542 hiring hall (JA 384).

The questions of control and delegation, then, are individual questions. There are myriad local agreements, national agreements and individual project agreements that must be examined to determine the true extent of any individual contractor's ability to exercise control over the union hiring hall. Not only may this degree of control vary from contractor to contractor within the class, but a particular contractor's degree of control may well vary from construction project to construction project. There are simply no findings from which it can be concluded that any individual class member exercised control over Local 542's hiring hall sufficient to make it the "master" of the hiring hall.

Furthermore, the National Labor Relations Act prohibits an employer from exercising the type of control over union operations that an agency relationship would require. *Lummus Co. v. N.L.R.B., supra.* Indeed, the very contention that a union is the servant of the employer with which it negotiates runs counter to the fundamental premise of the National Labor Relations Act, which is that the labor organizations formed by workers must remain independent of employer influence. Plainly, the district court's imposition of *respondeat superior* in these circumstances ignores the legal and economic balance of power fashioned by Congress and this Court in applying our federal labor laws.

D. *The Imposition of Vicarious Liability Under the Circumstances of This Case Jeopardizes the Stability of Collective Bargaining Throughout the Construction Industry.*

One result of the district court's holding is that a construction contractor who utilizes a union hiring hall becomes its guarantor and is *per se* liable under §1981 for any racially discriminatory referrals by the union. This is so even if the discriminatory referrals do not affect that contractor's workforce, but affect the workforce of another contractor, or affect

a universe of several hundred other contractors using that same hiring hall.

If the lower court decisions represent the law of the land, the only way a national contractor like Bechtel can escape liability for countless unknown, and unknowable, union violations of §1981 is to negotiate the deletion of hiring hall provisions from each of its national agreements and to resist such provisions in each locality where it is engaged. That, flat out, is a recipe for a labor relations war in the construction industry.

Bechtel's situation is not unique. Every contractor, large or small, having an exclusive hiring hall clause in its labor agreement faces the same dilemma.[21] These contractors could protect themselves only by eliminating the hiring hall requirement from their labor contracts. Yet, it can be said beyond peradventure of doubt that any such effort by contractors would be answered by the nation's construction trade unions with strikes and picketing. This is amply evident from the two strikes conducted by Local 542 to support its demand for a hiring hall agreement. The risk of widespread disruption of labor relations in the construction industry, at odds with our national labor policy of promoting peaceful collective bargaining, is sufficient reason alone to reject the vicarious liability theory adopted below.

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[21]Some 40 national agreements and 6,000 local agreements currently are in effect in the construction industry. U.S. Department of Labor, "Annual Construction Industry Report, April 1981", p. 12.

POINT III

By imposing classwide vicarious liability, the district court erroneously created for §1981 a lower threshold of liability than exists for Title VII.

Prior to the decisions below, it was uniformly recognized that §1981 required a standard of proof either greater than, or equivalent to, that required under Title VII. Thus, as described earlier, the prevailing view is that §1981 requires a showing of purposeful discrimination, whereas Title VII affords protection to discriminatees on a disparate impact theory, even in the absence of intent. The minority view has been that a violation of §1981, like Title VII, requires at least a showing of disparate impact, but no more. Yet, in the present case, Bechtel has been found liable for a violation of §1981 and subjected to a comprehensive mandatory injunction without a finding either that it purposefully discriminated or that its use of Local 542's hiring hall, in fact, caused a disparate impact on its own workforce.

There is no evidence in the record that Bechtel's workforce reflected a statistically significant disparity in the employment of minorities. Evidence of a class-wide disparity constitutes neither legal nor logical proof of a similar disparity in the workforce of Bechtel.[22] Absent evidence that some act of Bechtel's produced a statistical disparity in Bechtel's employment of minorities, the district court could not find that "racial discrimination was [Bechtel's] standard operating procedure — the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted). The absence of such a finding would bar liability under Title VII; if Title VII standards are to govern §1981, then the absence of such a finding must also bar liability

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[22]Similarly, statistical evidence that women as a class live longer than men as a class is not proof that an *individual* woman will experience the actuarily computed longevity. *See, City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

under §1981. Plaintiffs, quite simply, failed to establish a *prima facie* case of unlawful racial discrimination by Bechtel.

Consider the ramifications of the classwide vicarious liability theory applied by the district court. Under that theory, the employer is liable for a violation of §1981 where: (1) the use of a union hiring hall is required by a facially neutral provision of a labor contract, (2) the employer does not, and could not, know of the union's discriminatory operation of the hiring hall, and (3) the discriminatory hiring hall does not, in fact, result in racial imbalance in that employer's own work force.

Under this theory, an employer who hired but a single operating engineer through the Local 542 hiring hall during the period from 1965 to 1978 is personally liable under §1981 for compliance with the broad restraints of the injunction, even if the single operating engineer hired was a black.[23] Thus, the decisions below expand §1981 to the point where proof of *neither* intent *nor* disparate impact is required.

This is far, far beyond where any court has previously ventured in its interpretation of §1981. In fact, it is far beyond where any court has ventured in its interpretation of Title VII. After this Court's decisions in *Teamsters, supra,* and *Furnco, supra,* it is clear that an employer is only liable under Title VII if a plaintiff can demonstrate that discrimination has occurred and is manifest in some fashion in that employer's workforce. The decisions below dispense with this requirement.[24] In so

[23]In the case of one of the defendant-employer class members, Barger, Inc., summary judgment was denied and the employer subjected to the decree despite uncontradicted evidence that minorities constituted at least 50% of its workforce at all relevant times (JA 126).

[24]The decisions below also deprived absent class members of the defense that, for them, use of the hiring hall was a business necessity. *See, Griggs v. Duke Power Co., supra.* This defense was apparently not presented by Glasgow, perhaps because it is more typical of national contractors. *See,* Bastress, *Application of A Constitutionally-Based Duty of Fair Representation to Union Hiring Halls* 82 W.Va.L.Rev. 31, 47-48; Bourton and Levitt, *Union and Open Shop Construction,* at 62-63 (1980).

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doing, they redefine §1981 as a statute imposing not a higher standard of proof than that required by Title VII, or even an equivalent standard, but one that imposes a lesser standard of proof than that required by Title VII.

POINT IV

The defendant-employer class was improperly certified.

The district court's certification of the defendant-employer class is distinct, but not entirely separable, from its legal conclusions on liability. On the one hand, the court's abrogation of § 1981's intentional discrimination standard provided a shortcut through the requirements of Rule 23(a);[25] on the other hand, certification of the defendant class was the court's justification for imposing liability without regard to individual workforce statistics. The certification of the defendant-employer class, therefore, merits scrutiny.

It is well settled that a proposed class may only be certified if it satisfies the four mandatory requirements of Rule 23(a) and one of the three alternative categories of Rule 23(b). *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 163 (1974). In this case, (A) the defendant-employer class does not satisfy the "commonality" and "typicality" requirements of subdivisions (2) and (3) of Rule 23(a); (B) conflicts of interest preclude Glasgow from adequately protecting the interests of absent class members, as required by subdivision (4) of Rule 23(a); and, (C) as a matter of law, the district court erred when it certified the defendant-employer class pursuant to subdivision (2) of Rule 23(b).

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[25]Federal Rule of Civil Procedure 23 will be referred to herein simply as "Rule 23", with reference to appropriate subparts. The full text of Rule 23(a) and (b) appears in the Addendum.

A. *The Commonality and Typicality Requirements of Rule 23(a) Were Not Satisfied.*

Subdivisions (2) and (3) of Rule 23(a) require, respectively, that there be "questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The district court considered these requirements to be no bar to certification of the defendant-employer class, because it viewed the sole issue in Stage I to be whether the contractors could be held vicariously liable for Local 542's acts of discrimination (PA 202).

If proof of discriminatory intent is required by § 1981, certification of the defendant class was clearly erroneous. Intent is an inherently subjective, and therefore individual, matter. Whether employer "A" had the requisite discriminatory intent is simply not a question in "common" with whether employer "B" also had the requisite intent. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), (reversing certification of a defendant class of real estate brokers in an antitrust action). The district court acknowledged this when it held that plaintiffs' claim that the defendant-employers intentionally discriminated was "inapplicable in this defendant class context because of the individual questions presented." (PA 128). Consequently, a determination that § 1981 requires proof of discriminatory intent creates 1400 individual questions of fact, and renders certification of the defendant-employer class improper.

The district court also found that the defenses presented by Glasgow, the class representative, would be "typical" of the defenses each of the 1400 absent defendant class members would have presented. This conclusion was preordained by the court's wrongful denial to the employers of all individualized defenses to liability — circuitous reasoning of the highest

order. In particular, the court received no minority utilization figures for any contractor other than Glasgow. However, operating engineers are not employed by the defendant class, as such, or by "the industry"; they are employed by individual contractors. Evidence that Glasgow did or did not employ a representative proportion of minorities tells a court nothing about whether Bechtel employed a representative proportion of minorities. Without such a showing, liability cannot be imposed; conversely, the fact that such an individualized showing must be made renders the certification of the defendant-employer class erroneous as a matter of law.

B. ***Conflicts Between the Designated Class Representative and the Absent Class Members Render Class Certification Improper.***

Subdivision (4) of Rule 23(a) requires that the designated class representative "fairly and adequately protect the interests of the class." Stated another way, the class representative "must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975).

The greatest interest of putative class members is their interest in not becoming members of a certified class. Here, the class representative never submitted an opposition to plaintiffs' motion to certify the defendant class, and never responded to the Memorandum filed by plaintiffs in October, 1976 in support of their position that a defendant class was proper. The class representative's failure to protect the interests of class members by not actively opposing certification bears strongly on the adequacy of the representation that those class members might expect to receive. *See East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (discussing failure of named plaintiff to actively seek certification of a plaintiff class).

This early signal of conflict was amplified shortly after the district court issued its Judgment and Decree. The costs of implementing the decree (now over one hundred thousand dollars) were assessed by the district court against the named defendants (PA 283). Glasgow has consistently urged the district court to assess costs against the absent class members. Two of the consolidated appeals below found Bechtel opposing its "representative" Glasgow on this issue, and Bechtel currently has an appeal pending in the circuit court (No. 81-1514) relating to the assessment of costs. It would seem beyond argument that the interest of the absent class members lies in not being held liable for the amounts which Glasgow, their purported representative, seeks to have assessed against them. Such a patent conflict of interest compels the conclusion that Glasgow was not, and cannot, adequately represent the absent class members.[26]

C. *The Defendant-Employer Class Was Improperly Certified Under Rule 23(b) (2).*

The district court's certification of the defendant class under subdivision (b) (2) of Rule 23 was also improper. While it appears that certification of a *plaintiff* class under subdivision (b) (2) is appropriate in employment discrimination actions, few courts have carefully addressed whether (b) (2) certification is appropriate for a *defendant* class. It is evident from a plain reading of subdivision (b) (2) that it was not intended to govern defendant class actions; and for this reason, the Fourth Circuit Court of Appeals recently concluded that certification of a defendant class under subdivision (b) (2) is not appropriate. *Paxman v. Campbell,* 612 F.2d 848 (4th Cir. 1980) (*en banc*).

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[26] In advancing this argument, we intend no allegation, or inference, of impropriety on the part of counsel for Glasgow. Rather, the conflict complained of springs inevitably from the improper certification of the defendant class.

One reason for preferring such a result is illustrated by this case. Whereas the discretionary notice permitted under subdivision (b) (2) failed to afford all class members an adequate opportunity to defend their individual interests (see Point V, *infra*), the mandatory notice and opt-out procedures of subdivision (b) (3) would have protected these important due process interests of the absent class members.

For all these reasons, the district court erred in certifying the defendant-employer class. Regardless of this Court's resolution of the liability issue, the judgment below should be reversed to the extent that it found the defendant-employer class properly certified.

POINT V

A defendant class action does not confer upon the district court personal jurisdiction over absent class members; therefore, the mandatory obligations of the decree must be vacated as to the absent class members.

The district court first certified a defendant class of employers in March 1972 (JA 118). A legal notice was sent to known class members in December, 1973 (JA 121). Several employers used the Local 542 hiring hall for the first time after 1973; these employers became class members but never received any notice regarding this litigation. Although no absent class member was ever served with a summons and complaint, all are subject to personal liability for failure to comply with the terms of the decree.

The district court held that through the device of the defendant class action it obtained personal jurisdiction over the members of the defendant class sufficient to bind them to the terms of the injunctive decree (PA 212). In so holding, it relied exclusively on the following statement in *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940):

> members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . .

However, preceding the statement excerpted by the district court is this statement:

> Nevertheless, there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. 311 U.S. at 42.

Thus, *Hansberry* should be read as holding only that defendant class members might be "bound" in the sense that the findings made in the class action would be *res judicata* as to the absent class members, if the class members were adequately represented.

This, we submit, is the proper scope of the defendant class action. Absent defendant class members in this case, for example, if adequately represented, might be bound by the *res judicata* effect of the district court's findings that Local 542 intentionally discriminated, that the collective bargaining agreement to which the defendant class members adhered was nondiscriminatory, and that the plaintiffs failed to prove that the defendant class members knew or should have known of Local 542's discrimination. Nothing in *Hansberry,* or any other decision of this Court, authorizes the imposition upon absent defendant class members of uniquely personal obligations such as employment quotas, training requirements, and reporting obligations. The procedural device of the defendant class action does not expand the courts' jurisdiction, nor can it override constitutionally-based due process considerations. *See Christopher v. Brusselback,* 302 U.S. 500 (1938). The misuse of the defendant class action as a shortcut to sweeping remedies, without regard for due process protections, should not be fostered.

A rule that absent defendant class members can be held personally liable may actually undermine the utility of the defendant class as a vehicle for judicial efficiency. Unnamed class members now have no obligation to appear, or to actively monitor the proceedings. See *Gonzales v. Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973). A defendant class member may be willing to rely on a class representative if the risk is simply that the absent class member will be foreclosed from relitigating certain issues in the future. The absent class member may not be prepared to rely on the class representative if the risk is that the absent class member will be individually and personally bound by an onerous injunctive decree or monetary damages.[27] Raising the stakes in defendant class actions in this manner will encourage, perhaps compel, the active participation of unnamed class members. The result will be that a defendant class action will become unmanageable, with no substantial decrease in the need to process collateral attacks by defendant class members who remain absent from the original action. The judicial system will have lost, however, the ability to resolve in an efficient manner those issues that are truly "common" and "typical."

For these reasons, the judgment below should be reversed to the extent that it imposes upon the absent defendant class members personal liability for compliance with the mandatory injunctive decree.

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[27]The decree here involved only mandatory injunctive obligations; but the district court offered no principled rationale for distinguishing between the exercise of *in personam* jurisdiction for injunctive purposes, and exercise of *in personam* jurisdiction over absent class members for an award of damages. In either case, non-compliance is punishable as contempt.

CONCLUSION

For the foregoing reasons, Bechtel Power Corporation respectfully requests this Court to reverse the judgment of the court of appeals, and direct that the judgment and decree of the district court be vacated insofar as it applies to Bechtel and other unnamed members of the defendant-employer class.

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Respectfully submitted,

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ADDENDUM

Statutory Provisions and Rules Involved

42 U.S.C. § 1981 and § 1982

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

§ 1982 Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold, and convey real and personal property.

Statutory Provisions and Rules Involved

§ 1 of the Civil Rights Act of 1866:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

Statutory Provisions and Rules Involved

§ 16 and § 18 of the Enforcement Act of 1879:

Sec. 16. And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulations, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Sec. 18. And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Statutory Provisions and Rules Involved

§ 1 of the Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions and Rules Involved

Subdivisions (a) and (b) of Federal Rule of Civil Procedure 23 provide:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually

controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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No. 81-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION, *Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA AND RAYMOND WILLIAMS, WILLIE McKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, AND FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL CONSTRUCTORS ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE NATIONAL CONSTRUCTORS ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief is submitted by the National Constructors Association as an amicus curiae pursuant to Rule 36 of this Court.

The National Constructors Association (herein NCA) is a non-profit, voluntary association composed of fifty-six

of the Nation's largest, unionized construction contractors.[1] NCA member companies design and construct industrial facilities throughout the United States and abroad. These facilities include nuclear and fossil fuel electric power plants, oil refineries, pipelines, chemical and petrochemical plants, mining and metallurgical facilities, paper mills, and many other industrial processing facilities.

NCA member companies perform their construction projects using union-represented labor. Typically, NCA member companies do not retain a permanent workforce of construction employees. Instead, on each project they employ skilled building trades workers in the project's geographic area under collective bargaining agreements with building trades international unions. Since the construction of a large industrial facility may require the employment of ten or more separate building crafts, it is not unusual for an NCA member to have at a single project, collective bargaining relationships with several building trades international unions.[2]

The collective bargaining agreements used by NCA members are varied and diverse. Some have been negotiated by the NCA on behalf of its member contractors. Others are negotiated by the individual NCA member company directly with the international union. The agreements may be multi or single craft, regional, local or national in scope.[3]

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[1] Petitioner Bechtel Power Corporation is a member of the National Constructors Association.

[2] During the 1970's roughly 40% of all construction workers were represented by sixteen trade unions, fifteen affiliated with the AFL-CIO, and the Teamsters. Office of Construction Industry Services, U.S. Department of Labor, *Annual Construction Report* at pp. 3-4 (April 1981).

[3] For example, the National Industrial Construction Agreement is a multi-craft, regional agreement between the NCA, on behalf of its member companies, the Teamsters and eight building trades international unions. This agreement covers NCA member com-

All collective bargaining agreements that have been negotiated by NCA obligate the signatory contractors to hire craft employees through local area hiring halls.[4] These

---

panies' construction projects within a 15-state area in the South and Southwest. NCA member companies also frequently sign multi-craft "project" agreements with international unions and their subordinate local unions, covering construction of a single large project. While these contracts are binding on the locals, the locals may or may not be signatories. Most NCA members also are signatory to "National" agreements with one or more international unions. These agreements govern the employment of a specialized construction craft on the company's projects throughout the United States. For a description of the categories of collective bargaining agreements in the construction industry see generally, Labor-Management Services Administration, U.S. Department of Labor, *The Bargaining Structure in Construction: Problems and Prospects*, pp. 4-5 (1980).

[4] Since 1975, the following collective bargaining agreements, all of which contain hiring hall provisions, have been negotiated by NCA on behalf of its member companies:

National Industrial Construction Agreement with the Teamsters and eight building trades international unions

National Agreement with the International Brotherhood of Boilermakers

National Agreement with the United Brotherhood of Carpenters and Joiners of America

National Agreement with the International Association of Bridge, Structural and Ornamental Iron Workers

National Agreement with the Laborers International Union of North America

Tri-State Agreement with the Laborers International Union of North America

National Agreement with the Operative Plasterers and Cement Masons International Association

National Agreement with the Sheet Metal Workers International

National Agreement with the International Brotherhood of Teamsters

National Agreement with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada.

hiring halls are operated by the international unions' local union affiliates having jurisdiction of the geographic area containing the project site. Virtually all collective bargaining agreements negotiated independently by NCA members, whether project agreements, national agreements or local agreements, contain similar hiring hall provisions.

Under this system of doing business, it is not uncommon for a national contractor to use local hiring halls of several craft unions on each of its construction projects. Accordingly, the District Court's decision in this case, that liability for a discriminatorily operated hiring hall may be imposed on any employer using the hiring hall, is of vital interest and utmost concern to the NCA and its member companies.

SUMMARY OF ARGUMENT

The District Court's decision imposes automatic, *per se* liability on contractors using hiring halls for the acts of racial discrimination practiced solely by the union operators of the hiring halls. This liability attaches "whether or not the [contractors] knew or should have known [of the Union's discrimination]".

As a representative of national, unionized contractors, NCA submits that the District Court's decision should be reversed for several reasons. First, the Court's holding gravely endangers historic and essential construction industry employment practices and undermines important, long-standing federal policies encouraging these practices. Second, the District Court's holding that contractors can be held liable for the Union's unlawful hiring hall discrimination under principles of agency is incorrect because contractors have no control over union hiring halls. Also contractors' use of hiring halls is not consensual, but is compelled by strikes and union monopoly power over union labor. Third, it is unfair to impose liability upon con-

tractors, since they are powerless to prevent discrimination in hiring hall operations.

1. Congress and this Court have recognized that hiring halls have had a long and essential role in the construction industry. Federal policies encourage hiring halls because they fulfill specialized needs of the construction industry. Hiring halls permit the bidding and construction of large and geographically remote projects. They allow contractors to determine in advance of a project the availability and cost of labor. For employees, the hiring hall serves as a central location for employment and information.

The District Court's decision substantially impairs the ability of this federally sanctioned hiring hall system to function. Since national contractors may use several separate hiring halls on a project the lower Court's decision exposes them to multiple *per se* liability on each of their construction projects. The potential liability is staggering and can only result in contractor attempts to abandon or restructure the hiring hall system. These efforts undoubtedly will trigger labor-management discord, including strikes and, as government studies have shown, may cause severe injury to the affected contractors.

NCA does not suggest that these consequences outweigh the strong federal policies to erradicate racial discrimination in employment. NCA submits, however, that racial discrimination in hiring hall operations can and should be eliminated only by assessing liability against those responsible, *i.e.*, the unions that control the hiring halls and engage in the acts of discrimination. By correctly assessing liability, in this case only against Local 542, the unlawful discrimination will be remedied without disruption of valid and federally sanctioned construction industry practices and requirements.

2. The District Court's decision premised the contractors' liability for the Union's discrimination on the doctrine

of *Respondeat Superior*. However, the District Court misapplied the doctrine, reflecting the Court's misunderstanding of construction industry operations.

The principal's right to control the agent is fundamental to the existence of an agency relationship. However, it is well established that contractors lack any control over hiring hall operations.

Congressional debates concerning Title VII of the Civil Rights Act of 1964 reflect Congress' understanding that contractors could not control and, thus, could not be held responsible for, union hiring hall discrimination. Construction of the Civil Rights Act of 1866 should reach the same result.

An agency relationship also must be consensual. However, federal labor law approves the use of union strikes and coercion to compel contractors' acceptance of union hiring halls. Since federal policy sanctions the use of coercive tactics to achieve hiring halls, a consensual agency relationship cannot emerge from a contractor's use of the hiring hall.

3. The District Court's decision is manifestly unjust because it disregards the undisputed inability of contractors to learn of, or correct, discriminatory hiring hall referral policies. National contractors rarely negotiate collective bargaining agreements with the local unions which operate the hiring halls and thus cannot negotiate hiring hall antidiscrimination safeguards. Even if such negotiations occurred, contractors are, in many instances, powerless to secure such safeguards because their union agreements are prehire agreements. Unions have no legal obligation to negotiate or sign prehire agreements, let alone agree to contractor demands for hiring hall antidiscrimination safeguards.

Additionally, the nature of construction operations makes it virtually impossible for national contractors to learn

of the discriminatory operation of a hiring hall since those contractors have little opportunity to become acquainted with the referral practices of the local unions operating the hiring halls.

Finally, the inequity of saddling contractors with liability in these circumstances is even more egregious because NCA member contractors have no alternatives to the building trades unions and their hiring halls. Each craft union has a monopoly over the unionized workers in its particular trade, and contractors performing unionized construction must develop a collective bargaining relationship with each union and use its hiring hall to obtain workers in that trade.

ARGUMENT

I. The District Court's Opinion Undermines and Endangers Historic and Congressionally Sanctioned Employment Practices in the Construction Industry.

Under the District Court's holding, any contractor receiving a referral through a discriminatorily operated hiring hall is held strictly accountable for acts of racial discrimination practiced solely by the union operator of the hiring hall. The District Court's opinion imposes automatic, *per se* liability on a contractor simply "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the [contractors] knew or should have known [of the Union's discrimination]" 469 F.Supp. at 401. Moreover, the contractor's liability exists irrespective of whether the Union's discrimination affected the contractor's employees or its referrals from the hiring hall.

The District Court conceded that "no case has been found which imposes civil rights liability on the employer . . . in these precise circumstances". *Id.* 469 F.Supp. at 401. Despite this paucity of support, the District Court assessed liability against a broad spectrum of non-culpable, un-

involved contractors. In so doing the District Court's decision gravely endangers historic and essential construction industry employment practices and undermines important, long-standing federal policies encouraging these practices.

Hiring halls have had a long and widespread existence in the construction industry.[5] Their utilization has been necessitated by the unique needs and operations of the construction industry.

Construction industry employment is sporadic and intermittent. Labor force requirements constantly change during the several phases of project construction as well as during interstices between projects. These variable work-force demands are fulfilled by union-operated hiring halls which provide a ready pool of skilled labor in the geographic area where the construction work is to be performed. Additionally, construction companies, by contacting the hiring halls, can determine the availability and cost of labor before estimating and bidding projects. The hiring hall thus serves a crucial function that permits the bidding and construction of large, and frequently geographically remote projects. See, Rains, *Construction Trades Hiring Halls*, 10 Lab. L.J. 363, 366-67 (June, 1959); Sherman, *Legal Status of the Building and Construction Trades Unions in the Hiring Process*, 47 Geo. L.J. 203 (1958).

Congress and this Court repeatedly have recognized the essential and special role of the hiring halls in the construction industry. In 1959, Congress, in recognition of the industry's special needs, carved out exceptions for the

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[5] Data collected by the Equal Employment Opportunity Commission shows that in 1969, approximately 1,500,000 workers in construction were employed in bargaining units where a hiring hall was utilized. This amounted to 59% of the nationwide total of union membership involved in construction. See, Hammerman, *Minority Workers in Construction Referral Unions Monthly Labor Review* at pp. 17, 19 (May 1972).

construction industry and construction industry hiring halls from several provisions of the National Labor Relations Act. The Senate Report accompanying the provisions of the Bill that were ultimately enacted commented:

> The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.
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> • • •
>
> In the building and construction industry it is customary for employers to enter into collective-bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

S. Rep. No. 187 on S. 1555 86th Cong. 1st Sess. at pp. 27-28. See also, Rains, *Construction Trades Hiring Halls, supra* at 368.

This Court has also favorably commented on the essential role fulfilled by hiring halls in the construction industry:

> The [National Labor Relations] Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." The hiring halls at times have been a useful adjunct to the closed shop. But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter, the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment". (Footnotes omitted.)

Local 357, International Bro. of Team., etc. v. *NLRB,* 365 U.S. 667, 672-673 (1961). And, as this Court also observed, Congress made clear the view that hiring halls are useful:

> In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall . . .

Id. 365 U.S. at 673-674, citing S. Rep. No. 1827, 81st Cong. 2d Sess. at pp. 13-14.

As is shown by the foregoing, federal recognition of the hiring hall's efficacy is not confined to the benefits conferred on employers. Employees greatly benefit from the

hiring hall in several respects. Hiring halls serve as central locations where jobs and employment information are readily available to potential employees. Work applicants are not forced to expend time and money seeking out remotely located construction projects. Additionally, given the short term nature of construction employment, the constant source of employment available through hiring halls allows employees to line up jobs in advance and minimizes periods of unemployment. This, in turn, stems the drain on state unemployment insurance funds and lessens upward pressure on employer and state contributions to such funds. See Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 Lab.L.J. 505, 507 (1958); Bastress, *Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls*, 82 W.Va. Law Rev. 31, 47-48 (1979).

The District Court's decision, unless reversed, imperils this federally sanctioned hiring hall system. Since national contractors, such as NCA members, normally must use several separate hiring halls to perform each construction project, the District Court's opinion exposes them to multiple *per se* liability for each construction project. The immensity of the potential liability is staggering.[6] If the District Court's opinion is not reversed, this potential lia-

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[6] The District Court, apparently aware of the magnitude of the potential liability inherent in its holding, carefully explained several times that its liability findings were confined to injunctive rather than damage liability. Nevertheless, it is difficult to conceive of the absence of damage liability where there exists injunctive liability. In any event, even the imposition of injunctive liability could subject the contractors to immense financial burdens. For example, under the District Court's Order, contractors, such as Petitioner Bechtel Power Corporation, are obligated to initiate and operate training programs. The costs of such programs may be substantial. More significantly, since a national contractor's exposure to liability may extend to several hiring halls, the costs of training imposed by injunctive liability of the type ordered by the District Court in this case could be inordinate.

bility can lead only to attempts to abandon or restructure the hiring hall system by the affected contractors.

Efforts to substantially change the hiring hall system would not only adversely impact historic methods for the performance of construction, but it would collide, head on, with the strongly expressed federal solicitude for hiring halls. As one noted commentator has concluded, the substitution of individual hiring in place of the hiring hall system would produce "the most disastrous consequences" for the construction industry, including disorder and delay for contractors and employees, construction inefficiencies and impairment of job safety. Rains, *Construction Trades Hiring Halls, supra* at 369.

Allowing the District Court's decision to stand also would inevitably lead to contractor-union strife that is contrary to the federal policy of promoting stable collective bargaining relationships.[7] The origin of this conflict is not difficult to foresee. For the reasons previously stated, hiring halls have become embedded in the collective bargaining structure of the construction industry. Frequently, hiring halls were agreed to after long, bitter strikes. Accordingly, it can be safely forecast that contractor efforts to abandon or to initiate changes in the hiring hall system would be resisted, undoubtedly to the point of a strike, by the construction unions. See, *infra,* pp. 19-20. Plainly, the fomenting of strikes and the disruption of established construction industry practices is disfavored by federal labor policy. The sheer size and magnitude of the industrial projects constructed by NCA members greatly magnifies the coercive power inherent in the strike weapon. Moreover, the potential losses attributable to a strike on such a project make it indefensible to require a contractor to risk strikes in an effort to halt the union's self-generated discrimination.[8]

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[7] See Section 1 of the National Labor Relations Act as amended, 29 U.S.C. § 151.

[8] In 1980, NCA member companies performed domestic construction projects with an aggregate value of over 26 billion dollars.

The foregoing should not be construed as urging this Court to uphold the federal policies encouraging construction industry hiring halls at the expense of the strong federal policies to eradicate racial discrimination in employment. Rather, the Amicus submits that racial or other proscribed discrimination in hiring hall operations can only be terminated by assessing liability against those responsible—*i.e.*, the unions that control the hiring halls and engage in the acts of discrimination. That is precisely what the Civil Rights Act of 1866, as well as the Civil Rights Act of 1964, require.

The lower Court's decision that contractors are subject to vicarious liability for the Union's unlawful behavior, not only trespasses across the perimeters of that statutory scheme, but it produces the above described disruption of construction practices and unnecessarily injures the federally sanctioned hiring hall process. By correctly assessing liability, in this case against only Local 543, the unlawful discrimination will be remedied without disruption to valid construction industry practices and requirements.

The failure of the District Court to consider any of those matters requires this Court's reversal of the decision below.

II. The District Court's Application of Agency Principles to Establish Contractor Liability for the Union's Discrimination Is Clearly Erroneous.

The District Court premised the contractors' liability for the Union's discrimination on the doctrine of *Respondeat Superior*. However, the District Court has misapplied this doctrine in at least two respects. These errors reflect the Court's patent misunderstanding of construction industry operations.

The 1977 Census of Construction Industries reported that 474,943 firms performed construction valued at 213 billion dollars in 1977. *Annual Construction Industry Report*, April 1981, *supra*, p. 8.

Section 1 of the Restatement (Second) of Agency (1957) states:

> (1) Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

The District Court's application of this principle to establish an agency relationship merely from a contractor's use of a union hiring hall is fundamentally wrong for at least two reasons. First, the contractor and union do not stand in the relation of principal to agent with reference to hiring hall operations because the union-operated hiring halls are not subject to the contractor's control; and, secondly, union resort to strikes and economic coercion to secure contractor use of the hiring hall eliminates the requisite consensual nature of the agency.

To begin with, the principal's right to control the agent is fundamental to the existence of an agency relationship. *NLRB* v. *Local No. 64, Falls Cities Dist. Council of Carpenters*, 497 F.2d 1335, 1336 (6th Cir. 1974). However, it is well established that contractors lack any control over union hiring hall operations. An exhaustive study by the Comptroller General of the United States into the failures of minorities to achieve opportunities in skilled construction crafts heavily emphasized this conclusion.[9] The Comptroller General's Report faulted federal efforts to extinguish discrimination in construction through approaches directed to construction contractors. Such efforts, the Comptroller General concluded, were doomed to failure because, unlike other union-employer situations, union construction em-

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[9] Comptroller General's Report To The Congress, *Federal Efforts To Increase Minority Opportunities in Skiled Construction Craft Unions Have Had Little Success* (Report HRD-79-13, General Accounting Office, March 15, 1979).

ployment is controlled by construction unions and not by the contractors. As the Comptroller General observed:

> OFCCP's approach to providing increased opportunities for minorities in the unionized skilled construction trades fails to adequately recognize that a union construction contractor is largely at the mercy of the unions as to whom it can hire. According to Federal construction contractors we interviewed, the construction craft unions with which they have collective bargaining agreements essentially determine whom the contractor can hire and, therefore, whether contract hiring goals will be met. The contractors thought it impractical to go outside their collective bargaining agreements to hire workers since there are few qualified minority construction workers outside of the unions. If a union does not have minority members to refer to a Federal contractor, the contractors do not believe they have the freedom to seek nonunion workers to meet the affirmative action obligations while the union has idle members. Contractors fear they risk a strike and other retaliatory action by the union.
>
> Should a contractor hire a nonunion worker, collective bargaining agreements typically stipulate that the worker must obtain a work permit from the union in 8 days to continue working. (A work permit is a temporary right to work granted by a union to a nonmember which permits him to work in the union's jurisdiction for the duration of a project. A permit holder receives a journeyman's wage and must pay dues, but receives no other benefits of membership.) If the union refuses to issue a permit—for example, because it has idle members—the collective bargaining agreement usually prohibits the contractor from employing the individual beyond 8 days.

An OFCCP regional official said that OFCCP has authority to force contractors into compliance by requiring them to go outside their collective bargaining agreements to hire minority craftsmen. He added, however, that *such action is used sparingly because it could force a contractor out of business* since unions would refuse to bargain collectively in the future with a contractor that violated an existing agreement. Ac-

> cording to the official, *the region attempted to force contractor compliance three times and each resulted in harm to the parties concerned.* An example of union retaliation was a case in which union carpenters refused to work for a contractor as long as it employed a nonunion minority trainee hired pursuant to a State's affirmative action requirements. The union members' refusal to work effectively eliminated the contractor's access to carpenters.
>
> We believe, therefore, that requiring contractors to go outside their union collective bargaining agreements is an impractical approach to increasing minority opportunities in construction craft unions. Although we recognize that contractors also can exert some pressure on unions to either admit minorities to journeyman ranks or issue them temporary work permits, we believe that, realistically, unions have the greater leverage in contractor hiring and that contractors are reluctant to violate their collective bargaining agreements.

Comptroller General's Report at pp. 24-25 (emphasis added). See also, *Id.* at pp. 13, 19-20.

An exhaustive study of the construction industry hiring hall system by the Department of Labor reached the identical conclusion. U.S. Department of Labor, *Exclusive Union Work Referral Systems in the Building Trades* at pp. 1-6 (1970). Another report, by an organization of construction service consumers, concluded that "Contractors who are dependent on the hiring hall have lost the right to hire or terminate their employees."[10]

Even more significantly, during the Congressional debate on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the precise issue raised by this case was

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[10] Task Force of the Construction Committee of the Business Roundtable, *Report on the Hiring Hall in the Construction Industry,* (1973), reprinted in Bureau of National Affairs, Construction Labor Reports No. 920 at p. E-1 (May 23, 1973).

the subject of a question from Senator Dirksen to Senator Clark, one of the Senate Floor Managers of the Bill. Recognizing the contractor's lack of control over the hiring hall, Senator Clark answered as follows:

> Question. If an employer obtains his employees from a union hiring hall through operation of his labor contract, is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? If the hiring hall sends only white males, is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.
>
> Answer. An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination—but the union hiring hall would be.

110 Cong. Rec. 7217.

Certainly, if the Congressional framers of Title VII did not intend that statute to extend liability to contractors for union hiring hall discrimination, such liability cannot be imposed under the guise of 42 U.S.C. § 1981.

The District Court's application of agency principles to saddle contractors with liability for the Union's illegal conduct ignores the reality of the unionized construction industry insofar as hiring hall control is concerned. Construction contractors simply exercise no control over the union hiring hall. Absent the right to control a union's operation of its hiring hall system, a contractor cannot be deemed the union's principal and cannot be held responsible for the union's unlawful hiring hall discrimination under agency principles.

The principal's right to control the agent's conduct is the essence of the agency relationship. Its absence, in

many varied settings, has precluded the imposition of liability against a purported principal.[11] Indeed, in *NLRB* v. *Local No. 64, Carpenters, supra*, 497 F.2d 1336, a case remarkably similar to this one, the absence of control over the methods and means of issuing work permits was the determinative factor in refusing to hold a Carpenters Local Union liable for the unlawful refusal to issue work permits by a Carpenters Union District Council. The Court reached this finding notwithstanding that the Local Union had created the District Council and delegated to it the Local Union's work permit duties.

The contractors' lack of control over the union hiring hall operations in this case mandates the same result.

The District Court's application of agency principles to hold the contractor liable for the acts of the union hiring hall also is erroneous for a second reason. It is union strikes or other coercive actions that compel contractors to accept the hiring hall. To be valid, an agency relationship must be consensual. Restatement (Second) of Agency § 15 (1957). See e.g., *Valley View Cattle Co.* v. *Iowa Beef Processors*, 548 F.2d 1219, 1221 (5th Cir. 1977), *cert. den.*, 434 U.S. 855 (1977).

It is well settled that hiring halls are mandatory subjects of bargaining. *Houston Chapter, Associated General Contractors of America, Inc.*, 143 NLRB 409 (1963), *enf'd sub nom., NLRB* v. *Associated General Contractors*, 349 F.2d 449 (5th Cir. 1965); *NLRB* v. *Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir. 1965). As such, the National Labor Relations Board has long held that unions lawfully may insist on or strike to obtain hiring hall clauses in their collective bargaining agreements. *National Union of Ma-*

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[11] See *e.g.*, Young v. Clear Lake Yacht Basin, Inc., 337 F. Supp. 1305, 1316 (S.D. Tex. 1972), aff'd, 473 F.2d 1389 (5th Cir. 1973), *cert. den.*, 414 U.S. 856 (1973); Globemaster Midwest, Inc. v. United States, 337 F. Supp. 465, 470-71 (Cust. Ct. 1971); Arnson v. General Motors Corp., 377 F. Supp. 209, 213 (N.D. Ohio 1974).

rine Cooks and Stewards (Pacific American Shipowners Association), 90 NLRB 1099 (1950).

The District Court found that Defendant Operating Engineers Local 542 conducted strikes of several weeks duration to compel employer acceptance of its hiring hall. Local 542's insistence on, and strike over, a hiring hall has many parallels among other craft unions. *See e.g., National Union of Marine Cooks and Stewards, supra; Houston Chapter, Associated General Contractors, supra.*

Where the federal labor policy expressly endorses a union's use of coercion, or threats of coercion, through strike activity to obtain employer agreement to hiring halls, the application of agency principles to assess liability against the employer for the operation of the hiring hall is patently improper because the use of the hiring hall is not voluntary. The hiring hall structure in the construction industry, therefore, contrasts sharply with employment agencies in other industries where the employer voluntarily selects the agency. The District Court's failure to consider and apply these differences fatally flaws its decision.

III. It Is Inequitable to Hold Contractors Responsible for Union Hiring Hall Discrimination Absent Contractors' Knowledge of and Ability to Prevent the Discriminatory Conduct.

The District Court's decision not only proceeds from erroneous legal premises, but it disregards the undisputed inability of the contractors to learn of, or correct, the Union's discriminatory referral policies. Saddling contractors with liability for acts they are powerless to prevent does not comport with the fundamental notions of equity and fair dealing upon which American jurisprudence rests.

As noted, national contractors enter national collective bargaining agreements with one or more building trades

international unions. These agreements provide that the national contractor will adopt on its projects many of the terms of the labor contracts negotiated by the international union's affiliated local union in the area. The adopted conditions universally include the obligation to use the local union's hiring hall.

As a general rule, the local unions neither negotiate nor sign National Agreements. Instead, the national contractor merely notifies the local union that the project will be performed under the terms of the National Agreement and requests employee referrals from the hiring hall. National contractors, thus, do not negotiate with the local unions concerning the establishment or operation of hiring halls or any other term or condition of employment. Hence, they are unable to negotiate antidiscrimination safeguards into the hiring hall operation.

Much more significantly, however, is the fact that the contractor is legally powerless to negotiate antidiscrimination safeguards even if it had the opportunity to bargain with the local unions about hiring hall operations. The contractor's collective bargaining agreements, in many instances, are prehire agreements since they necessarily antedate the start of construction and the hiring of employee complements. The National Labor Relations Board, with this Court's approval, holds that there is no statutory bargaining duty concerning prehire agreements in the construction industry. *R. J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), *enf. denied sub nom., Engineers Local 150* v. *N.L.R.B.*, 480 F.2d 1186 (D.C. Cir. 1973); *N.L.R.B.* v. *Local U. No. 103, Intern. Ass'n. etc.*, 434 U.S. 335 (1978).

The absence of a statutory bargaining duty means that the unions have no obligation to negotiate with a contractor about prehire agreements. This encompasses the right to refuse to participate in negotiations regarding the elimination or prohibition of discrimination in the operation of the unions' hiring halls. Indeed, it is the experience

of NCA members that building trades unions frequently offer contractors national labor contracts only on a "take it or leave it" basis. The proferred agreements universally include obligations to accept the local union hiring hall "as is" and the "take it or leave it" basis effectively precludes any contractor efforts to prevent or deal with discriminatory practices. The District Court completely disregarded these factors and its decision imposing liability on national contractors because of the union's discrimination in such circumstances is manifestly unjust.

Apart from these obstacles to a contractor's ability to ensure against union discrimination in the operation of the hiring halls, the very nature of construction operations makes it virtually impossible for a national contractor to learn of the discriminatory operation of a union hiring hall. Construction projects typically are of relatively short duration. A contractor's utilization of a particular craft and hiring hall may be limited to only a portion of the project. During this brief time span, the national contractor lacks any means of determining if discrimination infects the hiring hall apparatus. For example, a contractor could not evaluate whether a hiring hall was being operated in a discriminatory manner based on the number of minority referrals that it received. For, notwithstanding a discriminatorily operated hiring hall, a contractor could be referred an inordinate number of minorities.[12] Conversely, a nondiscriminatorily operated hiring hall could refer a totally white complement to contractor.

Nor can national contractors learn of hiring hall discriminatory practices in any other manner. National contractors are frequently strangers to the geographic areas of their projects. Their presence in the locale is transitory

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[12] This apparently occurred in this case since 50% of the referrals from Local 542's hiring hall to one contractor were minorities. See Bechtel Power Corporation Petition for a Writ of Certiorari, p. 17, n. 7.

and terminates when the project is completed. They rarely are members of the local employer association that negotiates the local collective bargaining agreements including the hiring hall provisions. These contractors, therefore, have neither the opportunity to discuss the operation of the hiring hall during negotiations, nor the time to learn of its operations through work experience in the locale. Rather, they are obligated to accept the hiring hall as they find it if they are to perform unionized construction in the area.

The inequity of fastening contractors with liability in these circumstances is even more egregious because NCA member contractors have no alternatives to the building trades unions and their hiring halls. Since each craft union has a monopoly over the unionized workers in its particular trade, a contractor performing unionized construction must develop a collective bargaining relationship and use the hiring hall to obtain workers in that trade. A contractor cannot, for example, obtain skilled pipefitters from the Ironworkers Union. Moreover, in many instances the unions, through their hiring halls, are the sole source of the large numbers of skilled tradesmen required to perform the construction of large industrial facilities. Additionally, some clients of NCA members require that their projects be built entirely with union labor thereby obligating the contractor to use the craft unions and their hiring halls.

The District Court's decision to disregard these matters and hold contractors accountable for the Union's hiring hall discrimination is patently unfair and must be remedied by this Court.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petitioner's brief, the judgement of the Court below must be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1981

BECHTEL POWER CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER BECHTEL POWER CORPORATION

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In The

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October Term, 1981

No. 81-333

BECHTEL POWER CORPORATION,

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v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER BECHTEL POWER CORPORATION

PRELIMINARY STATEMENT

The petition of Bechtel Power Corporation ("Bechtel") (No. 81-333) has been consolidated with four others (Nos. 81-280, 81-330, 81-331, and 81-332), each seeking review of the same judgment.* Respondents to each of the consolidated petitions are the Commonwealth of Pennsylvania and a class of minority operating engineers represented by twelve individuals (together, "respondents"). Bechtel submits this brief in response to those filed by respondents.

*In addition to the corporate affiliations of Bechtel Power Corporation set forth at p. iii of its Petition for Writ of Certiorari, the following are affiliates of Bechtel Power Corporation, or its parent Bechtel Group, Inc.: Highland Valley Services Company Limited, Societe Hoteliere de Fos, S.A., and Societe Civile Immobiliere de la Bastidonne.

In both their factual presentations and legal arguments, respondents have obscured and misrepresented the very limited role of petitioner Bechtel in the events producing its alleged liability. In Part I, below, respondents' factual misstatements are discussed. In Parts II, III, IV, and V, the merits of respondents' legal arguments are addressed.[1]

I

Respondents' broad generalizations ignore and misrepresent significant facts.

Respondents' briefs are salted liberally with references to "the employers" and "the petitioners", without distinction among the 1400 employers and several petitioners. "Employers" and "associations" are discussed as though interchangeable. Respondents' failure to recognize the clear differences between the various categories of defendants and their participation in critical events prejudices Bechtel and other unnamed defendants. Some of respondents' more egregious mischaracterizations and misstatements are discussed below.

A. *Matters Relating to the Employer Associations Are Irrelevant to Bechtel's Liability.*

Throughout respondents' briefs, the 1488 members of the "employer" subclass are portrayed as if all were members of the "association" subclass.[2] This characterization ignores the record below. The district court specifically found that

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[1]Bechtel, like petitioner United Engineers & Constructors Inc. ("United") (No. 81-330), is an unnamed member of the defendant contractor subclass. Bechtel adopts by reference the discussion in United's reply brief concerning the impropriety of the defendant class certification and the district court's lack of *in personam* jurisdiction over absent class members.

[2]Brief for Individual and Class Respondents, pp. 8, 8-12, 17, 21, 37.

"[r]elatively few [of the employers] are members of the defendant associations" (PA 29). Additionally, the evidence before the district court indicated that the named associations represented, at most, 241 of the 1488 identified employers — less than 20%. Respondents have never suggested any legal basis for connecting the remaining 1247 unaffiliated employers with the misdeeds of the associations, yet they continue to link both members and non-members with the associations.

Bechtel, in particular, is prejudiced by this "broad brush" attack because, to our knowledge, there is absolutely no evidence in the record that Bechtel was a member of any employer association. The associations were formed primarily for the purpose of negotiating local labor agreements with local unions, including Local 542 of the International Union of Operating Engineers ("Local 542"). Bechtel, however, is a party to a national agreement directly with the International Union of Operating Engineers. There is no basis in the record for respondents' contention that the associations were Bechtel's "negotiating agent" (Brief for Individual and Class Respondents, p. 37). Because the record is devoid of any evidence joining Bechtel and the associations, the conduct of the associations is simply of no consequence in determining whether Bechtel was properly held liable.

B. *Similarly, Bechtel Was Not Involved With Events Relating To The Philadelphia Plan and The Union's Affirmative Action Plan.*

Respondents invoke, as evidence of the perfidy of "the employers", certain events relating to the so-called Philadelphia Plan.[3] This was a program designed to implement Executive Order 11246 by insuring that contractors working on federally-funded or federally-assisted projects employed an

[3]Brief for Individual and Class Respondents, pp. 19, 32, 54.

appropriate number of minorities in each of several construction crafts (PA 31). Local 542 avoided participation in the Philadelphia Plan by substituting an Affirmative Action Plan, which was then signed by the named associations (PA 32). The district court found that: (1) Local 542 intentionally misstated its minority membership in the Affirmative Action Plan, (2) operating engineers would have been included in the Philadelphia Plan but for this overstatement of minority membership, and (3) the associations recklessly endorsed the misstatement (PA 35).

Whatever bearing these findings may have upon the liability of the associations, they are irrelevant to the liability of the employers. Clearly, the 1200-plus employers (including Bechtel) who did not belong to the signatory associations bear no responsibility for the actions of those associations with respect to Local 542's Affirmative Action Plan. Furthermore, the Philadelphia Plan, by its terms, applied only to the five counties of metropolitan Philadelphia, and had no application whatever to contractors working solely in the remaining 29 counties of Pennsylvania or in the State of Delaware, over which Local 542's jurisdiction also extends. Finally, because the Philadelphia Plan was designed to implement Executive Order 11246, it applied only to employers working on federally-funded or federally-assisted programs. There is no evidence in the record establishing which of the employers were within the coverage of the Philadelphia Plan.

This is no minor disagreement over a factual nuance. Respondents boldly assert that this Court may leave the decree below intact without concern because that decree does no more than impose on "petitioners" the obligations they "should have been under" pursuant to the Philadelphia Plan.[4] Bechtel is a "petitioner", and there is no evidence whatever that it

[4]Brief for Individual and Class Respondents, p. 54; see also p. 19.

would *ever* have been subject to the Philadelphia Plan. The district court did not find the employers liable because of events related to the Philadelphia Plan, and respondents' efforts to justify the decree on those grounds must fail, particularly as to employers such as Bechtel who were not shown to have been subject to the Philadelphia Plan.

C. *The Record Fails to Establish Any Link Between Bechtel and the JATC.*

The Joint Apprenticeship and Training Committee (JATC), established pursuant to local collective bargaining agreements, was a named defendant below. The district court found JATC "liable as the union is liable" (PA 167). Again, respondents improperly attempt to tar the employers, collectively, with JATC's culpability.

Respondents assert that "the employers, acting through the association, have equal authority for the operation of the JATC (PA 121)."[5] This statement is totally inaccurate with respect to the over 1200 employers who were not members of the associations. These employers played no role in the selection of JATC trustees. In fact, even as to employers who did participate in the selection of trustees, respondents' assertion is wrong as a matter of law. The trustees of the joint committee, regardless of by whom chosen, are independent fiduciaries beyond the control of either Local 542 or the associations. *See, NLRB v. Amax Coal Co.,* US. , 101 S.Ct. 2789 (1981).

Again, Bechtel has particular grounds for objecting to the liberties taken by respondents in linking its actions with those of a named defendant. Respondents acknowledge that the JATC is a creature of the local collective bargaining agreement (Brief for Individual and Class Respondents, p. 6), but there is

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[5]Brief for Individual and Class Respondents, p. 6.

no evidence in the record that Bechtel ever signed the local collective bargaining agreement.[6] Bechtel is a member of the defendant class because its national agreement obligates it to utilize local hiring halls where they exist. The hiring hall provisions of the local agreement with Local 542 are separate from the provisions establishing the JATC (see JA 227). Bechtel is unaware of any evidence in the record that its national agreement obligated the company to support the JATC or that Bechtel did, in fact, contribute to the funding of the JATC. Absent some evidence linking Bechtel and the JATC, findings with respect to the JATC's conduct are of no relevance to Bechtel's alleged liability.

D. *Bechtel Acted Only For Itself; and No Other Contractor Acted on Its Behalf.*

It is apparent from the foregoing that a fundamental flaw in respondents' brief is the treatment of "the employers" as a single entity capable of collective delegation and collective consciousness. Here again, respondents ignore the district court's findings and the realities of the construction world.

The district court expressly found "no sufficient proof that as a class the employers agreed to violate equal protection rights" (PA 197). Indeed, the district court found that "[n]ot even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union has been shown" (PA 198). Something less than 20% of the employers belonged to the named associations. Yet respondents paint all employers with the same brush. In so doing, they have not explained by what mechanism 1488 business competitors would or could move with a collective consciousness.

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[6]Respondents cite JA 320 as establishing that "the resulting contract was signed by all non-association employers." Brief for Individual and Class Respondents, p. 5. No such testimony or finding appears at JA 320.

Bechtel certainly never engaged in "collective" delegation of any authority. When Bechtel entered into its national agreement with the International Union, it bound no other employer to utilize any hiring hall. Nor did the agreement of United or Glasgow (or any other employer) to utilize the Local 542 hiring hall thereby obligate Bechtel to utilize the hiring hall. In short, Bechtel's hiring hall obligations arose independently of those assumed by the 1400-plus other contractors which are defendant class members.[7]

E. *The District Court Found No Evidence of Discrimination On The Part of Bechtel or The Defendant Class of Employers.*

Respondents' overly broad generalizations and characterizations mask one key aspect of the district court's decision. The district court did not find that Bechtel or the class of employers engaged in any act of discrimination. Not one. Indeed, the court determined that defendant-employer class neither knew of nor acquiesced in the discrimination perpetrated by Local 542 (PA 168, 195, 198). Respondents protest that a defendant cannot control a plaintiffs' theory of liability[8]; conversely, plaintiffs have pursued a particular theory of liability and are bound by its consequences. Respondents' continued insinuations that "the employers" have committed some violation of § 1981 cannot overcome the district court findings

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[7]A prime example of respondents' reckless disregard for the record is their discussion of "the petitioners[']" effort to remove the exclusive hiring hall from the local agreement through arbitration. Brief for Individual and Class Petitioners, p. 30, n. 42, and p. 49. Petitioner Bechtel, in fact, did not participate in those arbitration proceedings. Contrary to respondents' allegations, petitioner Bechtel has never "strenuously den[ied]" that it wanted an exclusive hiring hall and has never attempted to "vitiate the hiring hall".

[8]Brief for Individual and Class Plaintiff, p. 61.

to the contrary.[9] The liability of the employers is premised not on any act of their own, but solely on the acts of Local 542. Because neither the "nondelegable duty" theory nor the "respondeat superior" rationale advanced by respondents supports this extension of liability, the judgment below must be reversed.

II

The nondelegable duty standard proposed by respondents has no application under § 1981.

Bechtel seeks no exemption from coverage under § 1981 for construction-industry hiring halls. Bechtel urges only an interpretation of § 1981 consistent with its legislative history and its present scope and interpretation. It is respondents who, by urging this Court to graft upon § 1981 a "non-delegable duty" requirement, request that this Court add to the statute an element that Congress did not see fit to include, something this Court has said it will not do. *Northwest Airlines v. Transport Workers Union,* U.S. , 101 S.Ct. 1571 (1981).

To state that the "duty" imposed by § 1981 is "nondelegable" is meaningless until the substance of the duty created by § 1981, if any, is determined. Bechtel demonstrated in its principal brief that, if § 1981 imposes any duty at all on an employer, it imposes only the duty to refrain from *intentionally* discriminating in the selection and management of that employer's workforce. Respondents make no effort to refute that conclusion; indeed, they appear to reach a similar conclusion (Brief for Individual and Class Respondents, p. 47). A proscription limited to intentional discrimination, however, is the antithesis of the strict liability standard proposed by

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[9]Indeed, the evidence introduced by respondents established that the employers hired from referrals and terminated operating engineers in a nondiscriminatory fashion (JA 269, 270).

respondents. At the very least, liability for intentional discrimination requires a finding that *the decision maker* selected a course of action because of its adverse impact upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). There was no such finding here either as to Bechtel or the employer class.

Not surprisingly, respondents cite no judicial authority which supports their nondelegable duty theory. They refer to two cases involving § 1981[10]; these cases imposed liability on an employer based on the actions of supervisors employed by the employer. Several Title VII cases are cited[11]; these cases also imposed liability based on the actions of "supervisory personnel", "lower level of management", and the employer's "personnel officer." Respondents also rely on a series of "fair housing" cases[12]; in these cases, too, liability is imposed for the actions of agents. Thus, all of these cases on which respondents rely are actually "respondeat superior" cases and not "nondelegable duty" cases.

Accepting, as we do, that the Civil Rights Act of 1866 extends to private action, we submit that respondents bear a heavy burden of persuasion when they argue that Congress intended to incorporate into § 1981 a "nondelegable duty." As demonstrated above and in the reply briefs of United (No. 81-330) and Glasgow, Inc. ("Glasgow") (No. 81-332), respondents have failed to sustain this burden.

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[10]Brief for Individual and Class Respondents, p. 26, n. 33.

[11]*Id.* Respondents elsewhere acknowledge that the interpretation of Title VII is not pertinent to the interpretation of § 1981. *Id.*, p. 50 n. 63.

[12]Brief for Individual and Class Respondents, p. 26 n. 35.

III

The union-operated hiring hall was not the common law agent of Bechtel.

Respondents contend that, if § 1981 does not create a nondelegable duty, the employer class nevertheless can be held liable for the discrimination of the hiring hall based on principles of agency law.[13] Congress intended that the common law test of agency should apply to relationships created by our national labor law, *see, Carbon Fuel Co. v. United Mine Workers of America,* 444 U.S. 212 (1979), and the litmus test of the agency relationship is whether the purported principal has authority to control the physical conduct of the other party, *Logue v. United States,* 412 U.S. 521 (1973). As a matter of both law and fact, the employers here lacked control over the union-operated hiring hall.

As a matter of law, the employers, including Bechtel, were and are deprived of the means of controlling the day-to-day operation of the hiring hall by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* ("the NLRA"). *See* Brief for Petitioner Bechtel Power Corporation, p. 31, and Brief for Petitioner United Engineers & Constructors Inc., pp. 9-12; *see,* also, the *amicus curiae* brief filed by AFL-CIO in *National Association for the Advancement of Colored People v. Claiborne Hardware Co.* (No. 81-202), pp. 11-19.

Respondents ignore the significance of the NLRA. For example, respondents equate the use of union-operated hiring halls with the use of employment agencies.[14] However, an

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[13]Respondents have also propounded a "joint enterprise" or "joint venture" theory, not discussed by the courts below. We incorporate by reference the refutations of this theory set forth in the reply briefs of United and Glasgow.

[14]Brief for Individual and Class Respondents, p. 47.

employer is free to choose or not choose to use an employment agency, and to select from among the available agencies; the NLRA makes union representation a matter of choice for employees, not employers. An employer who has chosen to use an employment agency may terminate that relationship at any time; the NLRA makes unlawful an employer's effort to terminate its relationship with a labor organization which represents a majority of its employees.

The district court did not discuss the relevance of the National Labor Relations Act. It considered the existence of the collective bargaining agreement, and an employer's right to enforce that agreement, as sufficient evidence of a right of control over the hiring hall. However, this Court has already rejected the argument that every contractual relationship can be read as an agency relationship, *Logue v. United States, supra.* Respondents also fail to explain on what basis the employer class, which had no knowledge that the union was in violation of the agreement, had a duty to commence legal action to enforce the agreement.[15]

It does not diminish the significance of the national policy favoring equal employment opportunity for this Court to give effect to the equally long-standing national policy favoring orderly and stable labor relations. Respondents fail to recognize the intersection in this case of these two national

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[15]As evidence of an employer's right of control over the hiring hall, respondents cite the non-discrimination clause which was added to the local collective bargaining agreement in 1971. In fact, the legal effect of this clause is to restrict, not expand, the scope of any agency liability. A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if the person should know that the agent is acting improperly. Restatement of Agency, Second, § 166 (1958). The addition of the non-discrimination clause gave notice to all who transacted business with the hiring hall that it was not authorized by the employers to discriminate. Thus, the employers clearly cannot be held liable under agency principles for acts occurring after 1971.

policies. Rather, they characterize the discussion of the national labor law as an unworthy effort to construct some sort of "shield." Bechtel's position, however, is simply that the reality of the legal relationship created by the National Labor Relations Act must be taken into account when judging whether the common law test of agency is satisfied here. If this be a shield, it is one constructed long ago by the common law and act of Congress.

IV

The injunctive decree against the employers is not authorized by the All Writs Act, 28 U.S.C. § 1651.

Respondents urge that the All Writs Act, 28 U.S.C. § 1651,[16] provides a sufficient basis for the injunctive decree against the employers. Respondents are in error. The injunctive decree against the employers is neither necessary nor reasonable, under the circumstances of this case, and clearly fails to pass the tests enunciated recently by this Court in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977).

Common to *New York Telephone Co., supra,* and its progeny, is a situation in which a person subjected to an injunctive decree was not a party in the original lawsuit or, if a

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[16]The All Writs Act provides that:

> [t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. § 1651(a).

The district court did not rely upon the All Writs Act to support its injunctive decree. Rather, the court of appeals *sua sponte* requested supplemental briefing on the issue of whether the employers, if not liable under § 1981, were nevertheless appropriate parties to an injunction for the purpose of making effective a remedy against Local 542. The court of appeals did not find thereafter that the injunctive decree against the contractors was authorized by the All Writs Act.

party, was non-culpable.[17] The following discussion considers the scope of authority conferred by the All Writs Act over non-culpable parties such as the employers in this case.

A. *The Injunctive Decree Against the Employers Is Not "Necessary" To Remedy the Union's Acts of Discrimination.*

Respondents assert that "necessity required the inclusion of the employers" because the district court reformed their labor agreement with Local 542, set minority employment quotas, authorized direct hiring of minorities, and mandated training programs to remedy alleged shortcomings of the associations.[18] The "necessity" for the mandated training programs may be dismissed quickly. Absent evidence that Bechtel was a member of any association, it cannot be mandated to assume the burden of correcting the shortcomings of the associations.

To argue that the employers were "necessary" because the district court imposed on them racial employment quotas and authorized direct hiring of minorities is circular reasoning of the highest magnitude.[19] The relevant question is not whether an injunction against the employers is necessary to implement racial employment quotas, but whether those quotas — and the various measures taken to implement, record, monitor, and

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[17]Bechtel agrees with petitioner Glasgow that, even if the employers are considered culpable, the injunctive decree against them was unjustified and must be vacated. Brief on Behalf of Petitioner Glasgow, Inc., pp. 31-35.

[18]Brief of Individual and Class Respondents, p. 58.

[19]With regard to the alleged reformation of the labor agreement (Brief of Individual and Class Respondents, pp. 14, 19, 58), the district court never mentioned that it was reforming the local collective bargaining agreement, not even at JA 250, cited by respondents. Even more certainly, the district court never undertook to reform Bechtel's national agreement with the International Union of Operating Engineers.

enforce them — are themselves necessary to remedy the acts of Local 542 and JATC. The answer is that they are not.[20]

"Necessity" for the exercise of authority under the All Writs Act exists when a court must remove obstacles to the implementation of its lawful decree. It is not sufficient that there is someone in a position to theoretically frustrate implementation of the decree; there must be evidence that the person has so acted, or at least reason to believe he will act, to frustrate an order of the court. Thus, even the decisions upon which respondents rely deal with orders against persons actively interfering with court-ordered school desegregation[21]; and in *United States v. New York Telephone, supra,* the telephone company had refused to assist federal investigators, thereby necessitating an ancillary order directing it to do so.

There is no evidence here that the employers have frustrated or will frustrate the court's efforts to prevent discrimination. Here, the employers have made no efforts to resist the implementation of racial quotas for hiring hall referrals by the union. Evidence introduced by respondents at trial demonstrated that in the past the employers exercised their prerogatives under the agreement in a nondiscriminatory fashion (PA 269). In short, there is no reason to believe that the employers, as a class, will undertake any course of action designed to frustrate the purposes of an injunctive decree against Local 542. Moreover, should an employer do so, it might well then be subject to the district court's authority under the All Writs Act; but that event has not yet occurred.

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[20]Contrary to the assertions of the respondents, petitioner Bechtel has never conceded at any stage of these proceedings that imposition of racial quotas on the employers was necessary.

[21]*Bullock v. United States,* 265 F.2d 683 (6th Cir.), *cert. denied,* 360 U.S. 909 (1959); *Faubus v. United States,* 254 F.2d 797 (8th Cir. 1958); *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964).

Nor is the imposition of quotas upon the non-culpable employers "necessary" to fully remedy the past discriminatory acts of Local 542. The district court found that a pattern of discriminatory referrals by Local 542 caused an under-representation of minorities in the overall operating engineers workforce (PA 161, 163). The employers retain the right to hire from among those referred (PA 26), and respondents' own evidence established that the employers have made this decision in a non-discriminatory fashion (PA 269). The respondents' evidence also demonstrated that the employers have not terminated minorities for discriminatory reasons (PA 270). In other words, when the union has referred minorities, the employers have employed minorities. Thus, for purposes of prospective injunctive relief, correction of the union's referral practices is all that is necessary to provide minorities with their fair share of work.

Respondents' discussion of long-term and short-term jobs[22] simply misses the point. The overall "number of hours that operating engineers work" is controlled not by the employers, but by the needs of the job — a contractor cannot decide to build a little more bridge or power plant this month in order to meet a work hours quota. More importantly, if Local 542 makes referrals in a random, nondiscriminatory fashion (as it is required to do), the distribution of long-term and short-term jobs will likewise be random and nondiscriminatory.[23] Furthermore, there was neither evidence nor finding that the employers discriminated in requesting referrals for short-term or long-term jobs. Therefore, there is no basis for a finding that an injunction imposing racial quotas on the employers is

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[22]Brief for Individual and Class Respondents, p. 53, n. 65.

[23]This statistical principle was the foundation of respondents' proof at trial that Local 542 had made referrals in a discriminatory fashion, and is equally reliable when fashioning a remedy.

"necessary" to provide effective relief to respondents. *See, Eldredge v. Carpenters 46 Northern California Counties Joint App. and Training Comm.*, 662 F.2d 534 (9th Cir. 1981), holding that employers who hired apprentices were not "necessary" parties under Federal Rule of Civil Procedure 19 in order to provide relief against alleged discrimination of Joint Apprenticeship and Training Committee.

B. ***The Injunctive Decree Against the Employers Is Unreasonably Burdensome.***

Even where it is found necessary to subject a non-culpable person to an injunctive decree, the obligations imposed by the injunction must not be burdensome. *United States v. New York Telephone Co., supra.* The injunctive order in *New York Telephone Co.* was found to be reasonable because it required the company to furnish only "meager assistance", required only actions that the company often undertook in its own business, was only to be in effect for 20 days, and directed that the company be compensated at prevailing market rates.

The injunctive decree here requires far more than "meager assistance" as applied against the employers. It subjects members of the employer class to future liability for failure to meet racial quotas (despite the absence of any finding of past discrimination by the class); requires detailed monthly reports of hours worked and wages paid in each district of the union; and requires financing by the employers of special training programs, publicity programs, and the sending of notice packets to class members. Moreover, the decree here is to be in effect, not for 20 days, but for five (5) years. Finally, rather than being compensated for the cost of compliance, Bechtel and other employers are expected to finance the reporting and training burden out of their own pockets. When imposed on non-culpable employers, these burdens are unreasonable under any fair standard of judgment.

V

The decision in this case will in no event impede continued progress toward equal employment opportunity.

Respondents correctly point out that the consolidated petitions "deal . . . with the scope of § 1981 and not Title VII."[24] The Court's interpretation of § 1981 in these cases will neither expand nor contract the rights and remedies afforded by Title VII of the Civil Rights Act of 1964. Employers in the construction industry, with or without hiring halls, as well as labor unions, will remain liable for any breach of their Title VII duty to provide equal opportunity. Respondents here simply chose not to exercise, as to Bechtel or the class of employers, the rights afforded them by Title VII. Fundamental questions concerning the proper interpretation of § 1981, however, cannot turn on plaintiffs' election of remedies. Rather, § 1981 must be interpreted and applied in a manner consistent with its own legislative history and present-day scope.

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[24]Brief for Individual and Class Respondents, p. 50 n. 63.

CONCLUSION

For the foregoing reasons, as well as those expressed in the briefs filed by petitioners in Nos. 81-280, 81-330, 81-331, and 81-332, incorporated herein by reference, petitioner Bechtel Power Corporation respectfully requests that this Court reverse the judgment of the court of appeals and direct that the case be remanded to the district court with instructions to vacate the injunctive decree in so far as it applies to Bechtel.

Respectfully submitted,

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